88-918

Supreme Court, U.S.
FILED
NOV 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

# In the Supreme Court of the United States

**October Term, 1988**

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

*v.*

BANK OF AMERICA, N.T. & S.A.,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

A. BARRY CAPPELLO
FRANCES E. KOMOROSKE
CAPPELLO & FOLEY
Attorneys At Law
831 State Street
Santa Barbara, California 93101
Telephone: (805) 564-2444

*Attorneys for Petitioners*
*CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL and GEORGE R. JEWELL*

Westside Law Publishers Los Angeles, California (213) 477-0491

89-PP

## QUESTION PRESENTED

Is it a violation of due process for an appellate court to render a decision when there is substantial evidence two of the three justices of that court have direct financial ties to one of the parties?

## TABLE OF CONTENTS


PAGE

I. QUESTION PRESENTED . . . . . ii

II. TABLE OF AUTHORITIES . . . . . vi

III. OPINION BELOW . . . . . .2

IV. JURISDICTION . . . . . .2

V. STATUTORY PROVISION INVOLVED . . . .3

VI. STATEMENT OF THE CASE . . . . . .3

VII. REASONS FOR GRANTING THE WRIT . . .8

1. The Lower Court's Decision Clearly Conflicts With the Decisions of This Court Regarding the Right to Due Process in Relation to Judicial Disqualification . . . . . .8

2. The Decision Wrongly Interpreted and Applied Federal Law on Judicial Disqualification . . . 10

3. The Issue is Important Not Only to California But Also to Other States Which Have Similar Rules on Judicial Disqualification, and It Is Likely to Recur Until Resolved by this Court . 14

4. The Decision Ignores the Constitutional Requirement That Justice Satisfy the Appearance of Justice . . . . . 14

5. The Decision Was Wrong and Will Have an Unduly Broad and Harsh Impact On Similar Cases . . . . . 15

6. The Substantial Federal Question Presented Is One of Overriding Public Interest Today . . . 17

VIII. CONCLUSION . . . . . 18

## LIST OF APPENDICES

Published Opinion of the Court of Appeal . . . . . App. A

Order of the Court of Appeal Denying
Request for Disqualification . . . . . App. B

Order of the California Supreme Court
Denying Petition for Review . . . . . App. C

## TABLE OF AUTHORITIES

PAGE

**CASES:**

*Aetna Life Ins. Co. v. Lavoie*
(1986) 475 U.S. 813 . . . . . .9, 13

*Berger v. United States*
(1921) 255 U.S. 22 . . . . . 11

*In Re Murchison*
(1955) 349 U.S. 133 . . . . . .8

*Kaufman v. Court of Appeal*
(1982) 31 Cal.3d 933 [184 Cal.Rptr. 302] . . . . 10, 11

*Liljeberg v. Health Services Acquisition Corp.*
(1988) ___ U.S. ___ [108 S.Ct. 2194] . 9, 10, 12, 14, 17

*Offutt v. United States*
(1954) 348 U.S. 11 . . . . . .8

*Potashnick v. Port City Const. Co.*
(5th Cir. 1980) 609 F.2d 1101,
cert. denied (1980) 449 U.S. 820 . . . . . 18

*Tumey v. State of Ohio*
(1927) 273 U.S. 510 . . . . . .8

*Union Independiente de Empleadas de Servicios Legales v. Puerto Rico Legal Services*
(D. P.R. 1982) 550 F.Supp. 1109 . . . . . 12

*United States v. Gigax*
(10th Cir. 1979) 605 F.2d 507 . . . . . 11

*United States v. Nobel*
(3rd Cir. 1982) 696 F.2d 231,
cert. denied (1983) 462 U.S. 1118 . . . . . 12

## TABLE OF AUTHORITIES CONTINUED

PAGE

**CASES: (Cont.)**

*United States v. Sibla*
(9th Cir. 1980) 624 F.2d 864 . . . . . 11

*Ward v. Village of Monroeville, Ohio*
(1972) 409 U.S. 54 . . . . . 8, 9

**STATUTES:**

28 U.S.C. section 455(a) . . . . . 10

28 U.S.C. section 1257(3) . . . . . .2

California Government Code section 68081 . . . . . .5

Fourteenth Amendment to the
United States Constitution . . . . . .3

**MISCELLANEOUS:**

Bureau of National Affairs,
*Lender Liability News* (June 15, 1988) . . . . . .4

Bureau of National Affairs,
*Lender Liability News* (Nov. 2, 1988) . . . . . .4

California Continuing Education of the Bar,
*Civil Litigation Reporter* (Sept. 1988) . . . . . .4

California Rule of Court 976(c) . . . . . .7

Canon 3C of the American Bar Association
Code of Judicial Conduct . . . . . 10

*The Recorder* (June 16, 1988) . . . . . .6

*No.* _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1988**

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

vs.

BANK OF AMERICA, N.T. & S.A.,

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE**

---

Petitioners Charles Duck, bankruptcy trustee of the estate of George M. Jewell and Laura E. Jewell, and George R. Jewell (the "Jewells") pray that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal, First Appellate District, Division One filed on May 18, 1988 and modified on June 17, 1988, review of which

was denied by the California Supreme Court on September 1, 1988.

## OPINION BELOW

The published opinion of the Court of Appeal as modified on June 17, 1988, appears in Appendix A. The order of the Court of Appeal denying the request for disqualification appears in Appendix B. The order of the California Supreme Court denying the petition for review appears in Appendix C.

## JURISDICTION

The judgment of the Court of Appeal was originally entered on May 18, 1988 and modified on June 17, 1988. A timely petition for review was denied by the California Supreme Court on September 1, 1988. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C. section 1257(3).

## STATUTORY PROVISION INVOLVED

*Due Process Clause of the Fourteenth Amendment to the United States Constitution*:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law
> . . . .

## STATEMENT OF THE CASE

The Jewells are a family of apple growers from Sebastopol, California who lost their livelihood and their ranch as a result of the acts of their lender, respondent Bank of America (the "Bank"). Over a period of four years, the Bank repeatedly defrauded the Jewells, took their ranch, and ultimately drove them into bankruptcy.

The jury agreed with the Jewells' rendition of the facts and, at the conclusion of a three-month trial, rendered judgment in their favor for $37.25 million, $20 million of which was punitive damages. The decision was heralded as a major victory for borrowers in a significant lender liability case. The effects of the decision were felt by banks throughout California and the rest of the country.

On the Bank's motion for new trial, the trial court conditionally granted a new trial if the Jewells did not consent to a $15 million reduction in the punitive damage award. The Jewells consented to the remittitur, the Bank appealed, and the Jewells cross-appealed.

In a decision described by neutral commentators and bank attorneys as "stunning," "highly unusual," "extraordinary," "very surprising," and "quite remarkable," the Court of Appeal overturned the verdicts. (See, e.g., Bureau of National Affairs, *Lender Liability News* (Nov. 2, 1988) p. 7; *Id.* (June 15, 1988) pp. 1, 9, 10; California Continuing Education of the Bar, *Civil Litigation Reporter* (Sept. 1988) pp. 264-65.) The basis for the reversal was an alleged lack of substantial evidence, yet overwhelming evidence had been presented to support each of the jury's findings that the Bank had committed actual and constructive fraud, and bad faith breach of contract in ten separate instances over a four-year period.

The decision was also anomalous in that the Court of Appeal had completely disregarded well-established California law which presumes judgments of lower courts to be correct, prohibits appellate courts from making factual determinations, and requires judgments to be upheld as long

as there is some substantial evidence to support them. Instead, the court below acted as the trier of fact, making credibility determinations, reweighing evidence, and drawing its own inferences from the facts as it selectively viewed them. The court also sua sponte raised and decided many issues without affording the parties an opportunity to brief them, in violation of California Government Code section 68081.

Stunned by the decision and the court's total disregard of traditional rules of appellate review, the Jewells filed a petition for rehearing with the Court of Appeal, setting out in detail all of the allegedly missing evidence. Nine days later the Jewells' counsel learned from other counsel in the case that the presiding justice of the three-member Court of Appeal panel which rendered the decision had stated on April 29, 1986 at oral argument of an unrelated Bank of America case that he owned stock in the Bank of America. At that same hearing, a second justice had stated he had a loan from the Bank of America. These conflicts were orally waived by counsel at the hearing.

The Jewells' counsel immediately began an investigation of these serious accusations of impropriety, which had never before been brought to their attention. A request was

lodged with the Court of Appeal that the two justices disqualify themselves and that rehearing be granted if the accusations were true. Because of the importance of the case and the unusual way it had been decided, these requests by the Jewells' counsel were widely publicized among the legal community nationwide.

The response by the Court of Appeal to these accusations was highly troubling. The presiding justice stated in a newspaper article that he owned no "reportable" interest in the Bank of America, implying he owned *some* interest. (*The Recorder* (June 16, 1988) p. 1.) The other justices declined all comment.

The justices' staff attorneys categorically denied any wrongdoing and claimed that the justices had not made the statements attributed to them at the April 29, 1986 oral argument. (*Id.* at 1, 7.) However, two independent, impartial attorneys present at that oral argument corroborated that the two justices had admitted they had financial ties to the Bank. Other statements by staff attorneys in defense of the justices were also proven to be false.

Additional evidence of the two justices' financial ties to the Bank of America was found in the financial reports the

justices filed with the California Secretary of State. These indicated that one of the justices, whose grandfather was one of the founders of the Bank of America, had an extensive loan history with the Bank. According to another report filed by that justice on February 29, 1988, he had a substantial, unsecured line of credit from the Bank in an undisclosed amount in excess of $10,000. Oral argument of this case had been heard four days prior to the date the report was filed.

In the face of this highly damning evidence, the Jewells' request for disqualification was denied, as was their petition for review. Instead, a new modified opinion was issued by the Court of Appeal which contained over one hundred legal and factual changes. In addition, this opinion, like the prior one, was ordered published, even though both opinions failed to meet the requirements for certifying an opinion for publication. (Calif. Rule of Court 976(c).)

A petition for review was then filed with the California Supreme Court. That petition raised the issues of whether the Jewells' right to due process had been violated and whether the two justices should have disqualified themselves since their impartiality could reasonably be questioned in light of their financial ties to the Bank of America.

In the meantime, another party to the appeal filed a request with the California Supreme Court for permission to take evidence on the disqualification issue. This request was made in order to determine whether the two justices did in fact have conflicts of interest which mandated their disqualification.

On September 1, 1988, the California Supreme Court denied all of these requests. In its order, the court noted that the "petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law." (App. C.)

## REASONS FOR GRANTING THE WRIT

### 1. The Lower Court's Decision Clearly Conflicts With the Decisions of This Court Regarding the Right to Due Process in Relation to Judicial Disqualification.

"A fair trial in a fair tribunal is a basic requirement of due process." (*In Re Murchison* (1955) 349 U.S. 133, 136; accord, *Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 54, 61-62; *Tumey v. State of Ohio* (1927) 273 U.S. 510, 523.) It is equally basic that "to perform its high function in the best way 'justice must satisfy the appearance of justice.'" (*In Re Murchison*, 349 U.S. at 136, quoting *Offutt v. United States* (1954) 348 U.S. 11, 14.)

Under this standard, it is not necessary to determine whether in fact a judge was influenced by an interest he had in the litigation, but rather whether the "appearance of justice" was served by having him hear a case where it "would offer a possible temptation . . . to the average [judge] . . . [to] lead him to not to hold the balance nice, clear and true." (*Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 822, quoting *Ward*, 409 U.S. at 60.)

These principles were recently applied by this Court to establish the rule that "when a reasonable person, knowing the relevant facts, would expect that a justice . . . knew of circumstances creating an appearance of partiality," that justice should disqualify himself. (*Liljeberg v. Health Services Acquisition Corp.* (1988) ___ U.S. ___, ___ [108 S.Ct. 2194, 2197].) This rule is extremely strict; it applies both retroactively and regardless of whether the justice was "actually conscious of the circumstances" creating the appearance of partiality. (*Ibid.*)

Here, the facts which the Jewells discovered clearly indicated that two of the three justices had direct, undisclosed financial ties to the Bank of America. That evidence in combination with the highly irregular manner in which the

decision was rendered created the unmistakable appearance that the two justices were not impartial.

That appearance mandated disqualification; this is true even if "the judge is pure in heart and incorruptible." (*Liljeberg*, 108 S.Ct. at 2202.) By refusing to order disqualification, the Court of Appeal violated the Jewells' right to a tribunal which not only was fair and impartial, but which also appeared to be so.

**2. The Decision Wrongly Interpreted and Applied Federal Law on Judicial Disqualification.**

California, like the Federal courts, has adopted Canon 3C of the American Bar Association Code of Judicial Conduct, which requires judges to disqualify themselves when "their impartiality might reasonably be questioned." (28 U.S.C. section 455(a); Calif. Code of Judicial Conduct, Canon 3C.) However, the manner in which the decision to disqualify is arrived at is vastly different in the two jurisdictions, as evidenced by the instant decision. Since the decision below incorrectly interpreted and applied Federal law, review should be granted to correct this error and prevent similar mistakes in the future.

Here, the two justices' refusal to disqualify themselves was based on *Kaufman v. Court of Appeal* (1982) 31 Cal.3d

933 [184 Cal.Rptr. 302].) (App. B.) In *Kaufman*, the California Supreme Court held that California follows the "Federal rule," which purportedly "allow[s] each appellate judge to decide for himself" whether he should be disqualified. (*Id.* at 940.) In reliance on this statement in *Kaufman*, the two justices apparently believed they were free to unilaterally and arbitrarily decide the matter of their own disqualification. This reflects an inaccurate and incomplete understanding of how the Federal rule is applied.

In 1921, this Court firmly established in *Berger v. United States* (1921) 255 U.S. 22 that when a judge is challenged for bias or prejudice, that judge can *only* decide on the legal sufficiency of the affidavits setting out the bias or prejudice; if the affidavits are sufficient, the judge must disqualify himself. (*Id.* at 33; accord, *United States v. Sibla* (9th Cir. 1980) 624 F.2d 864, 868; *United States v. Gigax* (10th Cir. 1979) 605 F.2d 507, 511.) This seemingly harsh result is mandated even if the challenged judge is aware of facts which indicate the allegations are false. (*Ibid.*)

Here, the declarations setting out the grounds for disqualification were legally sufficient albeit alleged on information and belief. (*Berger*, 255 U.S. at 33.) Nevertheless, the justices proceeded to rule on the *truth* of the declarations,

as evidenced by their conclusion that there was "no basis for disqualification." (App. B.)

In addition, the justices apparently decided that, in their own minds, there was no reasonable doubt about their impartiality. That faulty conclusion directly conflicts with the rule that in evaluating a charge of lack of impartiality, the issue is whether there are "facts that would create a reasonable doubt concerning the judge's impartiality, *not* in the mind of the *judge himself* or even necessarily in the mind of the litigant filing the motion . . . , but rather in the mind of a *reasonable man*." (*Union Independiente de Empleadas de Servicios Legales v. Puerto Rico Legal Services* (D. P.R. 1982) 550 F.Supp. 1109, 1111, emphasis added; accord, *Liljeberg*, 108 S.Ct. at 2203; *United States v. Nobel* (3rd Cir. 1982) 696 F.2d 231, 235, cert. denied (1983) 462 U.S. 1118.)

Here there was overwhelming evidence which would lead a reasonable person to believe that the court below was not entirely impartial in reaching its decision. The court's total disregard of traditional standards of appellate review was proof in and of itself of its lack of impartiality. That, combined with the evidence of the court's financial ties to the Bank of America, would lead even the most trusting observer to question the court's motives in overturning a

decision which was extremely detrimental to the Bank's interests.

### 3. The Issue is Important Not Only to California But Also to Other States Which Have Similar Rules on Judicial Disqualification, and It Is Likely to Recur Until Resolved by this Court.

There are no doubt other states which interpret their judicial qualification standards as loosely as does California. (See, e.g., *Aetna*, 475 U.S. at 822.) Until a clear, definite standard is adopted nation-wide which provides minimal guidelines on how due process rights to a fair and impartial tribunal are to be measured, decisions such as the instant one will continue to be rendered.

Each time such a decision appears, the public's skepticism of the judiciary grows, as does the opportunity for exploitation by those few judges who are unable to "hold to the balance nice, clear and true." (*Aetna*, 475 U.S. at 822.) It is therefore necessary for this Court to finally and firmly establish that such conduct by the judiciary, whether it be Federal or state justices or judges, is prohibited by the Constitution.

### 4. The Decision Ignores the Constitutional Requirement That Justice Satisfy the Appearance of Justice.

In no other area of our government is the "accused" permitted to decide his own guilt or innocence. The procedure

followed in this decision did exactly that by allowing the two justices to act as judges in their own case.

The Jewells do not contend, or even suggest, that the vast majority of the members of the American judiciary are unable to determine the fundamental question of whether their recusal in a particular case is necessary. However, those very few exceptions are the ones who linger in the public memory.

Where, as here, legitimate claims of impropriety are raised by litigants devastated by court decisions and then cavalierly dismissed by the judges rendering those decisions, the public learns to question every judicial determination and to assume each judge is motivated solely by self-interest. These "suspicions and doubts concerning the integrity of judges" represent concerns of "constitutional dimensions." (*Liljeberg*, 108 S.Ct. at 2204-05, fn. 12.)

The decision below does nothing to allay these concerns. Worse, by leaving open how such disputes will be resolved, it virtually ensures similar results in the future. What should a litigant do when he discovers information which strongly suggests there are grounds for judicial disqualification, yet the facts necessary to conclusively resolve

whether a genuine conflict exists are solely within the joint possession of the other party and the challenged judge, who both refuse to divulge them?

Here the Jewells' repeated pleas for critical information which might have disposed of their objections were refused by both the justices and the Bank of America. As a result, the Jewells were denied relief because they were unable to offer the evidence to make a "prima facie showing of conflict of interest or bias" (App. C), when the only two sources of the evidence refused to disclose it. Standards such as these make a cat-and-mouse game of due process principles, encourage judicial misconduct, and promote the public's belief in the "golden rule" that "He with the gold rules."

**5. The Decision Was Wrong and Will Have an Unduly Broad and Harsh Impact On Similar Cases.**

Above all else, the decision in this case was erroneous and resulted in a gross miscarriage of justice. Not only did the Jewells lose a judgment which would have compensated them for the serious wrongs they suffered at the hands of the Bank of America, but other segments of the American population will also sorely feel that loss.

This was a case closely watched throughout the country by lenders, borrowers, the farming community, and their at-

torneys. It represented the first of the major lender liability cases brought by farmers against their banks based on improper loan practices which were prevalent in the last decade.

Throughout that period, farmland drastically appreciated and lenders encouraged farmers to incur more debt secured by that land, thereby increasing the lenders' profits. This was done by lenders with little or no regard to what could happen if land values later fell. Fall they did, and with them many members of the farming community.

The response by those farmers to the resulting crisis was diverse. While some farmers in the Midwest murdered their bankers or committed suicide, others in California, like the Jewells, instead resorted to the courts for the justice they thought they deserved. The Jewells fleetingly obtained that justice, thereby instilling in other farmers the courage to follow the Jewells' lead and subject themselves to the expense, aggravation, and delay inherent in the judicial system.

That route was effectively foreclosed by the decision below. As a direct result of that decision, the belief is being perpetuated among the American populace that justice is not blind, and that trying to obtain it is futile.

**6. The Substantial Federal Question Presented Is One of Overriding Public Interest Today.**

The public's current perception of its elected and appointed officials is not a favorable one. Scandals, indictments, and impeachments have become an everyday occurrence. As the public's skepticism over the morality of its government grows, decisions such as the one below feed those feelings of distrust.

That trend can, and must, be reversed. This Court recently took a giant step in that direction in imposing strict standards for judicial disqualification in the hopes it would prevent "a substantive injustice in some future case" by encouraging prompt disclosure and disqualification. (*Liljeberg*, 108 S.Ct. at 2206.) *Liljeberg* apparently accomplished neither that goal nor its dual goal of promoting the public's confidence in the judicial process, as evidenced by the decision below.

It is therefore imperative that this Court take yet another step in that direction by remedying the grievous wrong committed in the instant case. Doing so will serve to further the elusive goal of "an unimpeachable judicial system in which the public has unwavering confidence."

(*Potashnick v. Port City Const. Co.* (5th Cir. 1980) 609 F.2d 1101, 1111, cert. denied (1980) 449 U.S. 820.)

## CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the California Court of Appeal.

**Respectfully submitted,**

**A. BARRY CAPPELLO**
**FRANCES E. KOMOROSKE**
**Attorneys for Petitioners**

*No.* _____

*IN THE*

*SUPREME COURT OF THE UNITED STATES*

*October Term, 1988*

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

vs.

BANK OF AMERICA, N.T. & S.A.,

*Respondent.*

## CERTIFICATION OF SERVICE

I hereby certify that on this 30th day of November, 1988, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Bertrand M. Cooper, Esq., O'Melveny & Myers, 400 South Hope Street, Los Angeles, California, 90071, counsel for Respondent. I further certify that all parties required to be served have been served.

**FRANCES E. KOMOROSKE**
**831 State Street**
**Santa Barbara, CA 93101**
**Counsel for Petitioners**

# APPENDIX

[Nos. A039161. First Dist., Div. One, May 18, 1988.]

[As modified June 17, 1988.]

IRENE O'CONNELL KRUSE, Plaintiff and Appellant, v. BANK OF AMERICA, defendnat, cross-defendnat and Appellant; CHARLES DUCK, as trustee, etc., et al., Cross-complainants and Appellants.

## SUMMARY

An owner of an apple processing corporation brought an action for fraud against a bank and an apple grower and broker, and the grower/broker cross-complained against the bank for fraud and bad faith denial of a contract. The grower/broker had made loans to the apple processing corporation out of short-term loans obtained from the bank, and it also attempted to obtain long-term financing for the benefit of the corporation. At the bank's suggestion the owner had transferred ownership of the majority of her shares in the corporation to the grower/broker. Eventually the bank denied the request for long-term financing, and both the corporation and the grower/broker became insol-

## APPENDIX A

vent. The jury returned a verdict against the bank and in favor of the owner and the grower/broker. (Superior Court of Sonoma County, No. 112439, Laurence K. Sawyer, Judge.)

The Court of Appeal reversed. It held that allegations that the bank had failed, when approving loans to the grower/broker, to make disclosures regarding the corporation and the possibility of its request for long-term financing being denied did not support the grower/broker's claim for fraud. The court also held that the grower/broker could not have justifiably relied on the alleged promise of the bank to make a long-term loan secured by the grower/broker's ranch, and that there was no evidence to support the grower/broker's claim for bad faith denial of a contract, since there was no contract. The grower/broker's injuries were the direct result of its self-created indebtedness, the court held, and thus neither the claim for fraud nor the claim for bad faith denial of a contract was supported by allegations that there was not solid, credible evidence that the financial losses sustained by grower/broker were caused by these loans.

## OPINION

RACANELLI, P. J.

## INTRODUCTION

The underlying litigation arises out of a series of related loan transactions involving apple growers and processors and the Bank of America (Bank) under the evolving theories of lender liability. Following a three-month trial, the jury returned a verdict against the Bank and in favor of plaintiff and cross-complainants aggregating $20,020,000 in compensatory damages and $26,675,000 in punitive damages.

The trial court granted the Bank's motion for a new trial as to punitive damages only, conditioned on plaintiff's and cross-complainants' acceptance of a remittitur to $6 million in punitive damages; the remittitur was duly accepted. The Bank appeals, contending, inter alia, that no basis for liability for damages has been shown. Plaintiff and cross-complainants have cross-appealed seeking to reinstate the full award of nearly $47 million and to recover counsel's travel expenses.

## FACTUAL BACKGROUND

Viewing the evidence, as we must, in a light most favorable to the judgement (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925-926 [101 Cal.Rptr. 568, 496 P.2d 480]), we narrate the factual background in some detail in order to discuss adequately the several issues raised in this extensive litigation.

George M. Jewell,[1] like his father before him, has been a well-established apple grower in the Sebastopol area for many years. By the early 1960's, George M. Jewell had developed an apple brokerage business, operated as a joint venture with his son, George R. Jewell. In addition to apples grown on their own ranch, the Jewells bought and collected apples grown by independent growers for sale to processing plants producing apple juice, dehydrated apples, applesauce, vinegar and other kindred products. At this time, about 80 percent of the apples harvested in the Sebastopol area were sold for processing purposes, and the remaining crop yield marketed as fresh fruit.

1 For ease of reference, the respective parties will be designated by their proper names unless otherwise indicated. Since the interests of the senior Jewells and the trustee-in-bankruptcy are identical, we will refer herein only to the former.

The two major apple processors in Sebastopol were the family owned James O'Connell Company and the Sebastopol Cooperative Cannery (Co-op). The Co-op processed apples grown by its members but also purchased apples from nonmembers or "independents" whenever the supply of apples from its members was inadequate. The Jewells had supplied apples to the O'Connell Company, the principal Sebastopol outlet for independent growers, for a great many years.

**1. The Near Collapse of the O'Connell Company.**

James O'Connell died in 1971, and his widow, Mrs. Irene (O'Connell) Kruse became the sole owner of the family corporation. Management of the business operations was entrusted to her 19-year-old son, Dan O'Connell.

The O'Connells had been long-standing customers of the local Bank, which had consistently funded their yearly operations. But in 1974, the Bank suddenly denied Dan O'Connell's request for a capital improvement loan for the O'Connell Company's processing plant. The following year, much to O'Connell's surprise, the Bank refused to provide the customary annual line of credit to fund the company's

business operations. William (Bill) Sullivan, the manager of the Bank's Sebastopol branch, extended some interim relief in the form of overdraft privileges approved as short-term loans secured by inventory and receivables; but without the annual loan funds, the O'Connell Company was soon unable to pay its creditors.

In April and May 1975, the Taylor-Doyle Company, one of O'Connell's major suppliers, obtained two judgments against the O'Connell Company for the sale of apples.[2] A sheriff's sale was scheduled in January 1976 to liquidate the O'Connell properties to satisfy the unpaid judgments.

Sometime during the summer of 1975, the Jewells learned of Dan O'Connell's business plight. Acting upon his son's suggestion, George M. Jewell agreed to assist O'Connell financially. In addition to his interest in keeping "a port open" for his suppliers, the independent growers, Jewell also wanted to aid his fellow farmer.[3]

2 The Taylor-Doyle lawsuits were initiated after Sullivan revealed to a company director (also a bank officer) that the Bank had withdrawn its financing of the O'Connell Company.

3 The Jewells were instrumental in setting up an informal trust fund for the O'Connell Company with contributions from other farmers in the community.

The Jewells were themselves longstanding customers of the Bank. George M. Jewell spoke to Bill Sullivan and told him of his desire to assist O'Connell. Sullivan soon arranged to lend George M. Jewell $150,000, which he could, and did, in turn loan to the O'Connell Company to discharge the unpaid judgments and to settle other pressing debts. On Sullivan's advice, Jewell obtained a promissory note for the $150,000 loan secured by a second deed of trust on the O'Connell property. (The Bank held the first deed of trust securing an earlier outstanding loan.)

Later that same year (1976), Jewell borrowed an additional $114,000 from the Bank to lend to the O'Connell Company to finance an equipment purchase; that loan was secured by another (third) deed of trust. And in August 1977, Jewell borrowed another $150,000 from the Bank which he again in turn loaned to O'Connell to enable the O'Connell Company to pay off an outstanding loan owed to the Bank.

George M. Jewell provided other assistance to the troubled O'Connell Company as well: he gave financial advice; he assisted in negotiations with O'Connell's suppliers

to extend terms of payment; and he began to supply the O'Connell Company with large quantities of apples on credit alone.

**2. Financing of New O'Connell Company Plant**

By 1977, the O'Connell Company had been ordered by a state regulatory agency to make substantial improvements in its waste water treatment facilities or to cease and desist operations. Confronted with the formidable competition presented by the new Co-op dehydration plant[4], Dan O'Connell decided to construct his own new dehydrating facility. Following O'Connell's positive discussion with George M. Jewell, the latter then discussed the idea with Bill Sullivan, who was equally enthusiastic about the proposed project. In view of the Bank's unwillingness to grant any further loans to the O'Connell Company, George M. Jewell undertook responsibility to obtain the necessary financing.

In December 1977, George M. Jewell and his wife, Betty, met with Sullivan to discuss a $1 million loan for the

4 In 1977, the Co-op embarked on the construction of a large dehydration facility to accommodate the expanding market for dehydrated apples. The Bank agreed to provide the necessary construction loan and long-term financing. Upon completion of the facility in 1979, the Bank had loaned the Co-op $17.7 million.

project payable over 20 years and to be secured by the new O'Connell plant. The Jewells were also to obtain an additional loan from the Bank to finance a lease-purchase arrangement whereby they would personally acquire ownership of a new "Proctor-Schwartz" dehydrator and lease it back to the O'Connell Company. After the December 1977 meeting, George M. Jewell believed that the Bank would provide long-term financing on the O'Connell plant. The following month, upon receiving a firmer estimate of construction costs from Dan O'Connell, George M. Jewell again met with Sullivan and told him that O'Connell would need $1.2 million. Sullivan replied that the Bank would not make the loan if Dan O'Connell remained as manager of the new plant. Reacting with surprise, George M. Jewell responded that he would not "kick Dan out of his own business."

Concluding that Bank financing was a "dead issue," the Jewells began searching for alternate financing. They were soon able to obtain a $650,000 loan for the O'Connell project from North Coast Production Credit Association (PCA) evidenced by a seven-year promissory note (repayable at $10,000 per month), the maximum terms available from PCA in a single loan. George R. Jewell agreed to, and did,

pay the monthly installments to PCA on behalf of the O'Connell Company. Construction of the new plant began in May 1978.

After the Jewells obtained the PCA loan, Sullivan told George M. Jewell that "the boys down below [Sullivan's superiors in the San Francisco regional credit office] kicked their butt for not taking the whole thing." George M. Jewell interpreted the statement to mean the Bank was interested in providing a long-term loan.

George M. Jewell knew that Sullivan did not have authority to approve large loans. (Sullivan's independent lending authority was apparently limited to $100,000.) Under the Bank's regular procedures, the branch officials were required to prepare a credit report (form CR-115) to be forwarded to the regional credit office for review and approval by an authorized credit officer.

During the early part of 1978, George M. Jewell met with Sullivan frequently to discuss the long-term financing needed for the O'Connell plant. In April 1978, Dan O'Connell began furnishing Sullivan with periodic progress reports on the construction work. Sullivan suggested various

design changes for the plant to avoid its possible classification as a specialized-use building operation. Sullivan knew that the regional credit office was reluctant to finance specialized buildings not readily convertible to other uses.

In the spring of 1978, George M. Jewell applied to the Bank for a $400,000 equipment loan to purchase the Proctor-Schwartz dehydrator. During the review by the Bank's regional credit office, Sullivan's superiors requested additional information concerning Jewell's equity interest in the O'Connell Company. As a consequence, Sullivan suggested to George M. Jewell that he should acquire controlling ownership of the O'Connell Company.

The equipment loan application was delayed for several months while the question of Jewell's ownership interest was being considered by Bank officials. In August, when the Bank had yet to approve the loan application, the Jewells returned to PCA. George M. Jewell then borrowed $370,000 and his son, $130,000, to finance the purchase of the Proctor-Schwartz dryer.[5] Thereafter, the Jewells

5 In April 1978, George M. Jewell had obtained a $300,000 credit line from PCA for equipment purchases for the O'Connell plant. He in turn loaned the money to the O'Connell Company.

modified their loan request to the Bank, which eventually approved a loan in the amount of $209,000 for equipment purchases for the O'Connell plant.

In November 1978, Sullivan invited the Jewells to a luncheon meeting with his superior, Norman Jensen. The two Bank officers visited the O'Connell construction site; neither man expressed any reservations about possible financing.

In December 1978, Sullivan strongly urged George M. Jewell to obtain a controlling interest in the O'Connell Company, explaining that it was becoming "difficult if not impossible" for the Bank to continue investing in the O'Connell project without Jewell possessing a controlling interest. George M. Jewell, aware of Sullivan's interest in wanting to protect himself (Jewell) and the Bank, believed that unless he had some equity ownership in the O'Connell Company, the Bank would not provide long-term financing.

On January 7, 1979, George M. Jewell met with Mrs. Kruse and her family and explained the Bank's insistence that the Jewells have a controlling interest in the O'Connell Company as a condition to the continued financing of the

dehydrating plant. She reluctantly agreed to transfer a majority of her stock to George R. Jewell for $180 with the expectation that the stock would be returned once the Bank funded the long-term loan enabling the O'Connell Company to repay the Jewells.

The Jewells and Dan O'Connell anticipated that the PCA construction loan, together with the equipment loans, would be sufficient to pay the costs of the dehydrating plant.[6] However, by the spring of 1979, project cost overruns required George M. Jewell to borrow additional sums from the Bank which he then loaned to the O'Connell Company. Thus, in March 1979, he first exhausted his $650,000 annual operating line of credit, then obtained Sullivan's approval for extended credit of an additional $445,000, or a total indebtedness of $1.095 million. Sullivan told George M. Jewell that something would be "worked out" at the end of the year.

The Jewells optimistically anticipated long-term financing which would permit consolidation of the several debts under a favorable repayment schedule amortized over a 20-

6 The total funds obtained exceeded $1.6 million: the four PCA loans aggregating $1.45 million and the Bank loan of $209,000.

year period. Still, they knew Sullivan himself lacked authority to approve a loan of that magnitude.

In April 1979, Sullivan and his regional office superior, Norm Jensen, again visited the O'Connell construction site. Well aware of Sullivan's inability to approve the million dollar loan package, George M. Jewell was anxious to hear Jensen's reaction. Jensen reportedly stated "it was a beautiful plant, and we're going to be able to help [you]." Jewell assumed that the statement indicated that the loan would be approved.

Sullivan shared a similar optimism of eventual loan approval by the regional credit office. In May 1979, as the project neared completion, Sullivan requested an appraisal of the O'Connell plant, the first step in preparing the customary CR-115. The Bank appraisal proved too low to justify a $1.9 million loan, motivating Sullivan to urge reconsideration by his superiors.

By August 1979, however, Sullivan realized that the regional credit office would not approve the loan. Sullivan soberly informed George M. Jewell that the Bank would be

unable to provide long-term financing on the O'Connell plant.

Shortly thereafter in September 1979, Sullivan was hospitalized due to a heart ailment and retired on disability.

Meanwhile, in November 1978, George R. Jewell had opted to build a "fresh pack" plant: a facility for storing high quality apples for future sale as edible fresh fruit. However, he did not obtain conventional financing (short-term construction financing and long-term payoff loan) but elected instead to use his personal resources and annual operating line of credit to fund construction. When he applied to the bank for a long-term real estate loan, Sullivan orally assured him the loan would be approved. In October 1979, the long-term loan was in fact approved by the Bank.

### 3. Events Leading to Bankruptcy

In January 1980, Roger Bunch, who succeeded Sullivan as local branch manager, approved George M. Jewell's $900,000 annual credit line and consolidated his short-term bank debts into an $850,000 loan payable over a four-year period. Bunch asked Jewell to execute deeds of trust on the Jewell Ranch as security for the loan. Jewell refused but did,

however, sign an agreement not to encumber the Jewell Ranch.

In 1980, prices of processed apple products fell dramatically, due in large measure to a 1979 bumper apple crop which created a glut on the market. The O'Connell Company sustained heavy losses that year and was unable to repay the construction loans advanced by the Jewells. The O'Connell Company was likewise unable to pay the Jewells for thousands of tons of apples supplied to the O'Connell Company for processing.[7]

By 1980, the O'Connell Company was indebted to the Jewells in the amount of $2.7 million: $1 million in loans and $1.7 million for apples supplied. The Jewells in turn were heavily indebted to their growers, to PCA, as well as to the Bank. Bunch concluded that George M. Jewell was so deeply in debt that "he wasn't going to get out." Accordingly, in September 1980, he summoned the Jewells to his office and

7 George M. Jewell's long-standing commitment to pay his growers at the prices posted earlier in the season produced a negative spiral effect: The Jewells' commitment to pay their growers above-market prices resulted in commensurately higher costs of supplies to the O'Connell Company now controlled by the Jewells.

announced that the Bank would not lend them any more funds.

In an effort to ease his financial dilemma, George M. Jewell agreed to place two "satellite" parcels of the Jewell Ranch on the market. His attempts to obtain financing from other lenders proved unsuccessful in view of the existing agreement not to encumber the Jewell Ranch. By November 1980, the O'Connell Company plant, along with the Proctor-Schwartz dryer owned by the Jewells, was placed on the market for liquidation.

On November 5, 1980, the Jewells responded to an invitation to meet with the PCA and Bank officials in San Francisco. At the meeting, attorneys for PCA and the Bank strongly insisted that the Jewells liquidate their properties in order to repay the outstanding loans or risk foreclosure proceedings.

George M. Jewell broke down emotionally prompting Bunch to put his arm around him with the verbalized assurance, "Don't worry, George, we'll take care of you." During the return trip to Sebastopol, Bunch told George M. Jewell that if he would give the Bank deeds of trust on the

Jewell properties as well as the proceeds derived from the sale of properties, the Bank would in turn pay the growers and protect him from the demands of PCA. A few days later, George M. Jewell and his wife executed and delivered to the Bank deeds of trust to all their real property and security agreements on their equipment.

Although the Bank never initiated foreclosure proceedings on the Jewell properties, it did insist that the Jewells liquidate the O'Connell properties to provide funds to pay off the outstanding bank loans. Meanwhile, PCA also began pressing its demands on the Jewells and the O'Connell Company for immediate payment of the outstanding unpaid loans. Indeed, PCA threatened to file a petition for involuntary bankruptcy of the Jewells in order to invalidate the transfer of their properties to the Bank.

On November 25, 1980, Mrs. Kruse filed a fraud action against both the Jewells and the Bank seeking damages and equitable relief. Two months later, the Bank received $381,000 from the sale of the two satellite parcels and released a portion of the funds to pay the senior Jewells' attorney fees in contemplation of a voluntary reorganization petition in bankruptcy, ultimately filed by the senior Jewells

on January 28, 1981. George R. Jewell filed a Chapter 11 petition the following May.

The culminated events raised doubts in the Bank officials whether to distribute the proceeds to the Jewells' creditors, including PCA and the growers, as Bunch had promised. However, the Bank eventually turned over the deeds of trust as well as the sales of proceeds to the trustee-in-bankruptcy.

In July 1981, the fresh pack plant was destroyed by fire; the fire insurance proceeds were applied by the Bank to George R. Jewell's outstanding loan. The final chapter in the tragic economic collapse was written in January 1982 when the O'Connell Company also filed bankruptcy.

## DISCUSSION

The Bank's main argument on appeal is that the judgment is unsupported by the record. (1) Accordingly, the scope of our review begins and ends with the determination whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted, which will support the conclusions reached by the jury. (*Estate of Leslie* (1984) 37 Cal.3d 186, 201 [207 Cal.Rptr. 561, 689 P.2d 133]; *Stevens*

*v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64 [107 Cal.Rptr. 45, 507 P.2d 653, 94 A.L.R.3d 1059].)

In reviewing the voluminous record, we must examine all factual matters in the light most favorable to the prevailing parties and resolve all conflicts in support of the judgment. (*Estate of Leslie, supra*, 37 Cal.3d 186; *Nestle v. City of Santa Monica, supra*, 6 Cal.3d 920, 925-926.)

(2) "Substantial" evidence, however, is not synonymous with "any" evidence. To constitute sufficient substantiality to support the verdict, the evidence must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 112 Cal.App.2d 638, 644; see also *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 [193 Cal.Rptr. 157, 666 P.2d 14]; *Yancey v. State Personnel Bd.* (1985) 167 Cal.App.3d 478, 482-483 [213 Cal.Rptr. 634]; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873 [197 Cal. Rptr. 925].)

As we will explain, our review of the whole record in light of such governing principles discloses an absence of

proof sufficient to establish the essential elements of the asserted causes of action. Therefore, we are compelled to reverse the judgments.

## I.

## JEWELLS' CROSS-COMPLAINT

The Jewells' cross-complaint against the Bank asserted theories of fraud (actual and constructive) and bad faith denial of the existence of a contract. In essence, the Jewells claimed that the Bank wrongfully induced them to borrow heavily in order to finance the O'Connell Company; that once the Jewells were hopelessly overextended, the Bank reneged on its promise to provide long-term financing to the O'Connell Company which would have enabled it to repay the Jewells; further, that after obtaining the Jewells' assets, the Bank betrayed them by failing to pay their other creditors (notably, PCA and the growers).

The jury awarded George M. and Betty Jewell $12.75 million and George R. Jewell $4.5 million in compensatory damages based upon special verdicts finding fraud and bad faith denial of a contract. The jury also awarded the Jewells

$20 million in punitive damages. We will conclude the verdicts are legally insupportable.

## A.

### Failure to Disclose

The Jewells' claims of actual and constructive fraud rest on a theory that the Bank had a duty to disclose certain information before making the requested loans; that had the Bank made the required full disclosure, the Jewells would have refrained from repeatedly borrowing the large sums of money. Thus, they contend, the Bank's conduct in wrongfully inducing them to obtain loans while fraudulently concealing material facts constituted actionable fraud.

Ordinarily, failure to disclose material facts known only to one party is not actionable fraud unless there is a fiduciary or confidential relationship imposing a duty to disclose. (Civ. Code 1710, subd. 3; 4 Witkin, Summary of Cal. Law, Torts (8th ed. 1974) 459-460, pp. 2724-2725.) *Rutherford v. Rideout Bank* (1938) 11 Cal.2d 479 [80 P.2d 978, 117 A.L.R. 383] [bank's confidential relationship with depositor-borrower]; *Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 516 [209 Cal.Rptr. 551, 55

A.L.R.4th 1017] [bank's "quasi-fiduciary" relationship with checking account holder]) was limited to the 1976-1977 loan transactions and terminated by reason of George M. Jewell's exercise of his own independent business judgment and actions in connection with the 1978-1979 financial transactions.

We need not navigate these murky waters. As will appear from our discussion, even assuming some duty to disclose existed, the Jewells have nonetheless failed to establish any cause of action based upon fraud.

**(1) The 1976-1977 O'Connell Loans**

The Jewells first complain that in making the loans used the save the O'Connell Company ($150,000 to satisfy the Taylor-Doyle judgments; $114,000 for equipment purchases; and $150,000 to pay an old bank debt), the Bank failed to disclose: 1) critical information regarding the O'Connell Company's banking history; 2) its low opinion of Dan O'Connell as a business manager; and 3) the benefits it derived as a result of the Jewells' loans to the O'Connell Company. Moreover, they charge, the Bank also failed to advise the Jewells to seek independent legal advice (due to

the Bank's "conflicting" interests) or to inform them of the resulting impact on their own financial condition.

But there is no solid, credible evidence that the financial losses sustained by the Jewells were proximately caused by the 1976-1977 loans. The loans made were secured by deeds of trust on O'Connell properties.[8]

Later, when the construction project began, the PCA loan paid off George M. Jewells' debt to the Bank, and his deed of trust was subordinated to the deed of trust held by PCA. During the years 1976-1980, the O'Connell Company paid to the Jewells a total of 1.7 million. Of that amount, $296,000 was applied to the notes payable (which included a 1 percent surcharge over the Jewells' corresponding interest rate paid to the Bank). By the end of 1977, the Jewells had fully repaid the 1977 $150,000 loan used to pay off O'Connell Company's bank loan; and that debt was cleared in March 1978. Thus, at the end of 1978, the Jewells were free from debt to the Bank except for the $209,000 equipment loan.

8 As earlier noted, the first loan of $150,000 was secured by a deed of trust junior to the Bank's trust deed. In August 1977, when George M. Jewell paid off the old bank loan, the Bank's senior security was extinguished.

In point of unassailable fact, the Jewells' precarious economic condition in 1981 directly resulted from significant independent intervening factors: 1) the heavy indebtedness incurred in 1978-1979 in conjunction with the construction of the O'Connell dehydrating plant; 2) the O'Connell Company's failure to repay the construction funds borrowed from the Jewells; 3) the devastating losses suffered in the 1979-1980 apple season as a consequence of paying above-market prices to their growers; 4) the O'Connell Company's failure to repay nearly $2 million owed to the Jewells for apples delivered during 1978-1980 for processing; and 5) the bankruptcy in 1980 of a major customer of the Jewells rendering a $232,000 receivable uncollectible. The record convincingly and conclusively demonstrates that the 1976-1977 loans made to finance the O'Connell Company were not a substantial factor in the Jewells' financial collapse.

**(2) 1978-1979 Loans for Plant Expansion**

In 1978 and 1979, the Jewells borrowed well over $1 million in short-term bank loans on the assumption the Bank ultimately would give a long-term loan on the O'Connell plant. The Jewells contend the Bank fraudulently induced them to

undertake the short-term borrowing without disclosing the possibility that their request for long-term financing would be denied.

Our review of the record fails to disclose evidence of sufficient substantiality to establish the essential element of justifiable reliance.[9] Testimony concerning one's own reliance is legally insufficient evidence if such reliance is without justification (Prosser & Keeton, The Law of Torts (5th ed. 1984) section 108, p. 750); a party plaintiff's misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance. (*Ibid.*) "If the conduct of the plaintiff in the light

9 We find the Jewells' companion argument of culpable nondisclosure of a May 1978 internal report predicting a decline in apple acreage in Sonoma County somewhat ingenuous. Jewell's testimony that had he known of this report, he would never have become involved in the O'Connell project, defies credibility.

The report cited the same statistics contained in an earlier report that Jewell read. The first report, however, explained why those statistics were misleading in that new plantings made the yield per acre greater and land use restrictions protected agricultural land. It is unreasonable to think that the Jewells' enthusiasm and confidence about the O'Connell dehydrating plant would have been shattered by the conclusory statement in the second report that Sonoma County would likely "lose some additional apple acreage during the next 5 years," particularly where the first report noted the same reduction in acreage but explained a favorable outlook for an increased apple supply.

of his own intelligence and information was manifestly unreasonable, ...he will be denied a recovery." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415 [115 P.2d 977, 136 A.L.R. 1291]; see also *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P. 2d 253, 44 A.L. R.4th 763].) Quite simply, the Jewells' hopeful expectations cannot be equated with the necessary justifiable reliance.

When the Bank in January 1978 denied the Jewells' request for long-term (construction) financing on the O'Connell plant, they went elsewhere (to PCA). Certainly, the Jewells were aware there could be no assurance that any of their requests to the Bank for long-term financing would be granted.

Moreover, George M. Jewell knew of Sullivan's limited lending authority and that his request for such a large loan required the approval of Sullivan's superiors. Obviously, knowledge that the loan request required such approval implies an awareness that any such request could be denied. (See fn. 10.) It follows, inescapably, that Jewell could not

have reasonably relied on the Bank's failure to disclose that the loan might be denied.[10]

The Jewells seek to support a finding of reliance by pointing to Jensen's April 1979 site visit and saccharine comments which, they claim, lulled them into a false sense of security and created an obligation in Jensen to dispel any illusion that the loan would be forthcoming.

Yet by April 1979, construction on the O'Connell plant was nearly completed. Given the Bank's earlier refusal to finance the O'Connell plant and the Jewells subsequent recourse to the seven-year loan obtained from PCA, the Jewells' assertion - that they would have avoided any financial entanglement in the O'Connell construction had they

10 As one of its claims of error, the Bank underscores the trial court's effective deletion of the requirement of justifiable reliance in the jury instruction given, viz.: "Where there is a fiduciary relationship, the one to whom the fiduciary relationship is owed has the right to rely on the representation made to him by the fiduciary without the duty of further inquiry."

We agree that this instruction erroneously permitted the jury to find fraud even though George M. Jewell knew Sullivan lacked authority to commit to long-term financing. The correct rule charges the beneficiary of a fiduciary relationship with investigating facts of which he has actual notice. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875 [191 Cal.Rptr. 619, 663 P.2d 177]; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131, fn. 12 [125 Cal.Rptr. 59].)

known long-term financing might be denied - cannot be logically accepted. Indeed, actual construction of the dehydrating plant began in May 1978, notwithstanding the fact that long-term financing had not yet been procured.

The Jewells further claim they reasonably believed an "oral" commitment had been made, especially in light of the Bank's prior oral commitments to the Co-op and to George R. Jewell, followed up with long-term (take-out) loans. But there is no evidence the Jewells even knew of the oral commitment made to the Co-op. And the financing on the fresh pack plant occurred in October 1979, *after* the Jewells were informed a long-term loan on the O'Connell plant would not be made.[11]

11 Nor could it be argued that the Bank's silence deterred the Jewells from seeking financing alternatives. As noted, in August 1979, Sullivan told George M. Jewell the bank would not grant a long-term loan. But it was not until a year later (October 1980) that the Jewells began to investigate alternative resources for the required financing. By then, their negotiating position was considerably weakened; they had lost their security, their deeds of trust on the O'Connell properties having been assigned to the Bank in connection with the $850,000 loan to George M. Jewell, and the Jewells had also signed the nonencumbrance agreement thereby effectively eliminating their ranch property as loan collateral.

### (3) Jewells' Ranch Loan

The Jewells further posit their claim of fraudulent inducement to engage in short-term borrowing on the Bank's alleged promise to make a long-term loan secured by the Jewells' ranch, if ever necessary. They construct their ancillary claim largely on statements made by Sullivan to George M. Jewell assuring such possibility, first in August 1977, when George M. Jewell borrowed $150,000 from the Bank to pay off the O'Connell Company's old bank debt; and again in December 1977, when the two men were discussing the probable terms of a long-term loan on the O'Connell plant.

Assuming the substance of Sullivan's statements could arguably be construed as positive assurances, again we find the evidence of justifiable reliance wholly insufficient. When discussions resumed in 1978 concerning long-term financing for the O'Connell plant, Sullivan openly suggested the use of the ranch as security. George M. Jewell *refused*, saying he did not owe the apple industry that much. In 1980, when Bunch arranged the consolidated $850,000 four-year loan, Bunch made a similar suggestion which the Jewells rejected because that loan was not the long-term loan they

desired. Finally, at the time a short-term loan was arranged for the Jewells to pay their growers, Bunch discussed the possibility of taking the Jewell ranch for collateral and was again met with an emphatic "no." George M. Jewell's persistent refusal to encumber the Jewell ranch belies the claim now asserted that the Jewells would not have undertaken the initial borrowing if they had known they could not thereafter obtain new financing secured by the ranch.

Moreover, it is clear from the record that it was not until 1980, *after* the Bank cut off any more unsecured loans, that the Jewells attempted to obtain a real estate loan on the Jewell Ranch. By then, of course, their circumstances had changed dramatically. By the end of 1977, the Jewells' only outstanding indebtedness to the Bank was the $150,000 loan used to pay off the O'Connell Company's bank loan. By 1980, in marked contrast, the Jewells' financial outlook was bleak indeed: not only did they owe the Bank over $1.3 million, they also owed PCA $1 million and their apple growers

$985,000. As of January 1980, the Jewell Ranch was valued at $1.337 million.[12]

Obviously, by that time, the Bank had decided it was not willing to lend any more funds to the Jewells. The Jewells could not reasonably have expected that the Bank's promise or assurances of a loan secured by the Jewell Ranch would extend indefinitely, notwithstanding such a staggering debt picture.

**B. Denial of Long-term Financing**

The Jewells' principal grievance against the Bank is its refusal to come to their financial rescue by providing long-term financing. The Bank's failure to do so, they strongly argue, constituted a bad faith denial of a contract. This theory of liability is equally devoid of supporting evidence in the record before us.

Tort liability based on bad faith denial of a contract was first recognized in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752 [206 Cal. Rptr. 354, 686 P.2d 1158]. Our highest court, while reiterating estab-

12 The Jewells also owned equipment and inventory, giving them a net worth of $4 million. But the value of their real estate did not approach the level of their indebtedness.

lished principles governing a breach of the covenant of good faith and fair dealing in the context of a contract remedy, declined to rule on the question whether such breach gave rise to a tort action in the context of an ordinary commercial contract.[13] Instead, the court fashioned a distinctly different form of relief: "a party to a contract may incur tort remedies when, *in addition to breaching the contract*, it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." (36 Cal.3d at p.769, italics added.)

Thus, the cause of action in tort arises when the party not only breaches the contract but also denies in bad faith that a contract even exists. The inherent precondition to such a tort claim is the existence and breach of an enforceable contract. (See *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 538-539 [238 Cal.Rptr. 363]; *Malstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 321 [231 Cal.Rptr. 820].)

13 More recently, the Supreme Court has declared that "not every breach of the covenant of good faith and fair dealing in a commercial contract gives rise to an action in tort." (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 497, fn. 11 [220 Cal.Rptr. 818, 709 P.2d 837].)

In *Seaman's*, there was no question that a valid (dealership) contract had been formed. The pivotal circumstance underlying the tortious conduct was the "*contracting* party seeking to avoid all liability *on a meritorious contract claim* by adopting a 'stonewall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics." (36 Cal.3d at pp. 769-770, italics added.)

In subsequent cases applying *Seaman's*, the formation of a contractual relationship was *not* in dispute; rather, tort liability, where found, was based on the bad faith assertion of an invalid defense by the party in breach. (See, e.g., *Commercial Cotton Co. v. United California Bank*, *supra*, 163 Cal.App.3d 511 [statute of limitations asserted by bank against checking account holder]; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal.App.3d 241 [208 Cal.Rptr. 524] [false grounds asserted by employer for wrongful discharge of employee].)

But the rule announced in *Seaman's*, explicated in its progeny, is not applicable here. There was no contract, oral

or written, between the Bank and the Jewells providing for long-term financing. Nor, indeed, have the Jewells alleged a cause of action for breach of contract by the Bank. Instead, they seek to impose tort liability on the Bank through the bare allegation of a bad faith *denial* of a contract. Neither the allegation nor its proof comes within the *Seaman's* contours of tort liability.

The jury was correctly instructed, and obviously found, that an underlying contract was a prerequisite to recovery. But the jury's special finding of liability on the asserted theory of bad faith denial of a contract is wholly unsupported in the record. To bolster their claim that the Bank was "committed" to a long-term loan on the O'Connell plant, the Jewells point to the following circumstances: the Bank granted them the equipment loan for the plant, which under ordinary bank practices would presuppose the extension of long-term financing; Jensen's favorable comments during his April 1979 site visit and his reported urging of long-term financing; Sullivan's stated intention (to his superiors) to make a "RE loan for packing shed, dehydrator, etc.," coupled with the later appraisal request informing regional officials that the proposed O'Connell loan proceeds would

repay the Jewells enabling them to discharge their debts to the Bank and PCA; and, lastly, statements in the Jewells' credit reports that the unsecured short-term loans would be repaid by "financing of real estate" or "RE loan for packing shed, dehydrator, etc."[14]

However, the Bank points out, correctly we believe, that the circumstances and events highlighted provide no basis to establish that a binding agreement was formed.

It is, of course, elemental that creation of a valid contract requires mutual assent ordinarily evidenced by an offer and acceptance. (See generally Civ. Code, sections 1550, 1565; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, 128, p. 153.) Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to

14 Over the Bank's objection, the trial court permitted expert testimony that Sullivan's actions and the Bank's conduct gave rise, inter alia, to an implied commitment of long-term financing. The Bank renews the objection on appeal, strongly contending that the irrelevant opinions of law prejudicially tainted the jury verdicts. In view of our determination (*post*), we need not discuss the questionable ruling.

know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." (Rest.2d Contracts, section 26, p. 75.)

As the distinguished commentator explains: "When the evidence clearly shows...that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms." (Corbin on Contracts, section 95, p. 397.)

Here, the entire subject matter under consideration - the long-term loan - was at best left open to future negotiations and agreement. George M. Jewell, fully aware of Sullivan's limited lending authority, was informed that Sullivan was "working on" obtaining the necessary approval from his superiors.[15] The Jewells' hopeful expectation that a loan agreement would eventually be reached was simply that: an expectation. The bank's manifestation of assent never materialized; and no agreement was ever formed.

15 The fallacy of the reasoning advanced by the Jewells is inherent in their unjustified assumption that Sullivan's repeated assurances that things would be "worked out" constituted a binding loan commitment. However, as previously discussed, assurances to work things out amount to no more than promises to continue negotiations looking to a future agreement.

Under such circumstances, the Bank was under no legal obligation or commitment to make a long-term loan.

Nor can the credit report (CR-115) submitted by the local branch in October 1979 be transformed into a contract, as contended.[16] That report was submitted without the Jewells' knowledge well after Sullivan notified the Jewells that no loan was forthcoming. Clearly, the unilateral submission under such circumstances could not constitute a mutual agreement between the parties on the terms and conditions proposed in that document.

The related theory that an agreement existed to extend financing on the Jewell ranch finds even less support in the record. There is a complete lacuna in the proof of essential terms of the claimed loan agreement; namely, the amount of the loan, the rate of interest, the terms of repayment, applicable loan fees and charges. The suggestion that terms similar to those contained in the 1979 credit report would apply on the ranch loan is both illogical and unreasonable.

16 In October 1979, a local branch official submitted a CR-115 to the regional credit office seeking approval of a $1.9 million O'Connell loan. The Jewells were unaware of this action. The loan was never approved, and the CR-115 was eventually returned to the local branch.

First, the proposed O'Connell plant loan was to provide long-term refinancing of the short-term construction loans; in contrast, the ranch loan discussions focused on the future "needs," if any, of the Jewells. As noted, by 1980, the Jewells were seriously overextended with the Bank, their growers and PCA. Yet no specific financial needs, loan amount or relevant terms were ever discussed. Moreover, George M. Jewell had indicated unequivocally on at least two earlier occasions that the ranch would not be used as security for a bank loan. Quite clearly, there is no competent evidence of the essential ingredients of a binding agreement to make a long-term loan secured by the ranch itself.

Inevitably, we must conclude the Jewells' reliance on a tort theory of bad faith *denial* of a contract to support the judgment is wholly misplaced. Such a theory of relief is unavailable where, as here, no underlying agreement exists. Without proof of an underlying agreement, tort liability may not be imposed on the Bank for its failure to provide long-term financing to the O'Connells or to the Jewells.

C.

**Failure to Distribute Assets**

Relying on similar theories of fraud and bad faith denial of a contract, the Jewells contend that the Bank's failure to apply the satellite parcels' sales proceeds to the debt owed their growers or PCA, as promised by Bunch, rendered the Bank liable in damages. Had the Jewells known the Bank would ultimately refuse to honor its commitment to repay their creditors, it is argued, the Jewells would never have agreed to assign trust deeds on their properties in the Bank's favor.

It is axiomatic that to obtain a recovery for fraud, a claimant must prove, inter alia, that damages were sustained as a proximate cause of the fraudulent conduct. (Prosser & Keeton, Law of Torts, *supra*, section 110, p. 767.) Assuming, arguendo, a claimant's reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. (Harper et al., The Law of Torts (2d ed. 1986) section 7.13, p. 465; see also *Bezaire v. Fidelity & Deposit Co.* (1970) 12 Cal.App.3d 888, 892-893 [91 Cal.Rptr. 142].) The absence

of the necessary element of causation, we conclude, is fatal to the Jewells' claim.

Even if Bunch's promise were false and fraudulent, the property loss sustained by the Jewells was not the product of Bunch's false promise but was the direct result of their self-created indebtedness. Put differently, even had they not assigned the trust deeds, their property would still have been subject to the satisfaction of the existing claims of their creditors.

Moreover, had the Bank distributed the proceeds to PCA and the growers, undoubtedly such distribution would have been successfully challenged by the bankruptcy trustee as an illegal preferential distribution. (See 11 U.S.C. section 547(b).) As it happened, the trust deeds and sales proceeds were eventually turned over to the bankruptcy trustee as part of the estate to be administered for the benefit of creditors. Thus, PCA and the growers stand in no less favorable position than if the Bank had made a voidable preferential distribution to them.

Understandably, The Jewells complain of the damages occasioned by the Bank's nearly three-year delay in turning over the assets to the trustee-in-bankruptcy.[17]

But the appropriate forum to seek recovery of damages in the form of attorney fees (as costs against the Bank) was the bankruptcy proceeding itself. Once a bankruptcy action is commenced, the bankruptcy court has exclusive jurisdiction over the debtor's property. (28 U.S.C. section 1334(d), formerly section 1471(e).) Thus, it is within the exclusive jurisdiction of the bankruptcy court to recover or restore assets belonging to the estate. (1 Cowans, Bankruptcy Law and Practice (1987) section 1.2(k), pp. 33-34; 9 Am.Jur.2d, Bankruptcy, sections 487-489, pp. 793-797.) As part of such action, the trustee may also recover prejudgment interest, costs, attorney fees and damages for loss of use of the property. (Bankruptcy Rule 7054.) Because the damages here asserted - attorney fees incurred due to the bank's intransigence - were recoverable in the bankruptcy proceeding, the Jewells cannot now split their cause of action in an attempt to recover them in this lawsuit. (See *Hatch v. Bank*

17 Apparently, the "turn-over" order required years of litigation and substantial costs in attorneys fees.

*of America* (1960) 182 Cal.App.2d 206,210 [5 Cal.Rptr. 875] [plaintiff cannot maintain a second action for damages (loss of use) following quiet title and possession action].)

Our analysis herein of the Jewells' fraud claim applies with equal force to the tandem claim of bad faith denial of a contract. Though the Jewells characterize their action in terms of a tort action, the gravamen of the claim asserted is a *breach* of contract. But even so considered, no merit is discerned: the Bank ultimately, though belatedly, performed in turning over the assets to the Jewells' legal representative, the trustee-in-bankruptcy. However, as already determined, the attorney fees and costs incurred in effecting the involuntary transfer are not recoverable in this subsequent action.

In conclusion, we hold that on the record before us the Jewells have failed to prove the Bank's liability in damages on the basis of fraud or bad faith denial of a contract. Accordingly, the jury's verdicts for compensatory damages cannot stand. And since the claims for punitive damages are mere incidents to the causes of action and cannot constitute the basis thereof (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801-802 [197 P.2d 713]; *Hilliard v. A.H. Robins Co.* (1983) 148 Cal.App.3d 374, 391 [196 Cal.Rptr. 117]), the

respective awards for such damages must be similarly vacated and set aside.

## II. KRUSE COMPLAINT

Mrs. Kruse's claim against the Bank was based solely on the Bank's conduct which contributed to her decision to transfer her controlling stock interest in the O'Connell Company to the Jewell family in 1979. The theory advanced at trial was that the Bank fraudulently induced Mrs. Kruse to execute the transfer of stock by misrepresenting to Mrs. Kruse that long-term financing would then be provided. Mrs Kruse was allegedly injured by the stock transfer because by relinquishing control of her company to the Jewells, she was thereby prevented from obtaining a long-term loan elsewhere.[18] The jury awarded Mrs. Kruse $2.77 million in compensatory damages: $2.67 million on alternate theories of fraud and intentional interference with prospective business advantage and $100,000 for emotional distress. The jury also

18 Mrs. Kruse argued below that the Bank's improper conduct was motivated by a desire to destroy the O'Connell Company, a competitor of the Co-op for the supply of available apples. It is noteworthy that on the Bank's motion for new trial, however, the trial court found "the evidence is not sufficient to show that the wrongful conduct of the defendant was motivated by a corporate plan or scheme to put the parties out of business."

awarded $6.675 million in punitive damages. We find the verdict likewise unsupported by the evidence in the record.

A.

**Fraud**

In order to uphold the verdict on the grounds of fraud, it must be shown by the evidence that the plaintiff changed her position in justified reliance on the fraudulent misrepresentation resulting in damage. (Civ. Code, section 1709; 4 Witkin, Summary of Cal. Law (8th ed. 1974) Torts, section 479, p. 2738; see also 37 Am.Jur.2d, Fraud and Deceit, section 223, pp. 297-299.) The change of position herein was the stock transfer upon the mistaken expectation that a long-term loan would be given. Mrs. Kruse was entitled, of course, to rescind the stock transfer when the long-term financing did not materialize. (Civ. Code, section 1689.) And a claim for rescission against the Jewells was initially pursued. However, by the time of trial, she had abandoned her claims against the Jewells for the now worthless stock.

Mrs. Kruse claimed two species of damages against the Bank as a result of the stock transfer: 1) the difference be-

tween the fair market value of her stock ($490,393) and the amount she received for it ($180); and 2) anticipated profits of the O'Connell Company, payable as dividends, which were lost because the O'Connell Company failed to receive the expected long-term loan. On appeal she reiterates her claim of damage by virtue of the "loss of the fair market value of the stock at the time it was pledged to the Jewells and the returns which it would have generated had the long-term financing been provided."

As to the diminished value theory of damages, the Bank correctly points out that it played no part in setting the price paid for the stock and any resulting loss of value. The nominal $180 payment by George R. Jewell was determined in the course of negotiations on January 7, 1979, between George M. Jewell, Mrs. Kruse and her son, Dan O'Connell. It is reasonable to conclude that Mrs. Kruse acquiesced in the nominal sum fixed with the expectation of facilitating repurchase at some future time. The price paid for the stock was totally independent of the asserted misrepresentations by the Bank. We are furnished no evidence from the record supporting a finding of a causal connection between the alleged damages and the Bank's fraudulent conduct.

It seems obvious that Mrs. Kruse's central complaint is not the Bank's fraudulent inducement but rather the Bank's refusal to provide long-term financing for the O'Connell Company. Indeed, her brief explains her position that she was damaged "not as the Bank asserts because of the nominal price of $180, but because the Bank repudiated its commitment to fund a long-term loan. ...[Para.]...Had the Bank lived up to its promise [of long-term financing], Mrs. Kruse would not have been damaged."

Yet, contrary to her assertions, the record contains no evidence of a "commitment" or "promise" to make such long-term loan. Unlike the Jewells, at trial Mrs. Kruse conceded there was *no contract* to lend money, since *no terms had been negotiated*. The thrust of her argument is directed to the Bank's conduct in 1977 and 1978 as the basis of an implied representation that the Bank would fund a long-term loan when in fact it had no intention to do so. The argument falls under its own weight, the record reflecting an absence of any substantial evidence supporting either an implied promise to lend money or the essential requirement of justifiable reliance.

At most, Sullivan expressed interest in securing the desired financing. As previously discussed, he and George M. Jewell engaged in ongoing discussions and negotiations for the purpose of obtaining the necessary loan approval from Sullivan's superiors, a prospect long incubating within George M. Jewell's hopeful expectation, an optimism he quickly shared with Mrs. Kruse and her son. Yet, George M. Jewell's optimism was unfounded. He knew that Sullivan lacked authority to approve the sizable loan necessary to fund the dehydration plant. The very premise of their frequent discussions was the need to obtain the approval of the regional office. In fact, the stock transfer in response to Sullivan's request was purportedly a step towards facilitating the needed approval. It is indisputable that the regional office's approval was recognized by both the Jewells and the O'Connells as a condition precedent to the Bank's expected commitment to extend long-term financing. The evidence of such contingent expectations and negotiations is far removed from a binding promise to lend money and also negates any reasonable reliance upon the Bank's alleged misrepresentations.

Moreover, the argument advanced is fatally defective for other reasons. We note that Mrs. Kruse's position is in polar opposition to that advanced by the Jewells. Mrs. Kruse claims that the Bank was bent on bankrupting the O'Connell enterprise in order to save the Co-op, the Bank's largest customer; that in furtherance of that design, the Bank secretly never intended to provide the needed financing to the O'Connell Company; and that the assurances given to George M. Jewell were knowingly false and calculated to deceive him. The Jewells, on the other hand, claim the Bank wanted the O'Connell Company to survive economically and used the Jewells as a vehicle to accomplish that goal. (Part I.A., *ante*.) The Jewells argue that the Bank was fully committed to providing the financing but then later repudiated its commitment. (Part I. B., *ante*.)

Thus, the jury's findings in favor of both Mrs. Kruse and the Jewells appear to be internally inconsistent and mutually exclusive: if the jury found that the Bank entered into an enforceable contract with the Jewells to provide financing for the O'Connell Company, then logically it could not also find that the Bank officials gave false assurances to Mrs. Kruse. Conversely, if the jury found the Bank falsely

promised Mrs. Kruse to fund the long-term loan, it could not have simultaneously found that the Bank had actually agreed to make the loan. Such a material inconsistency in the jury's verdicts alone mandates reversal of the judgment.

But, in any event, even if we were to view the Bank's statements and conduct as rising to the level of an enforceable promise to lend money, no competent evidence is shown of any causal connection between the change of position by Mrs. Kruse and her claimed damages. Her assertion that the Bank's "prolonged deceit" inducing her stock transfer "led to the financial ruin of them all" is nonsense. The stock transfer in no way imaginable caused the collapse of the O'Connell Company or, for that matter, the Jewells' own dire circumstances.

The damage which resulted from the lack of financing was the termination of the O'Connell Company's apple processing business, and that damage was to the *corporation*, not to Mrs. Kruse individually. The trial court properly precluded Mrs. Kruse from recovering damages for any in-

jury to the corporation, as she lacks standing to recover for injuries to the company itself.[19] (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530 [170 P.2d 898, 167 A.L.R. 271]; see also *Jones v. H.F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107 [81 Cal.Rptr. 592, 460 P.2d 464]; *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 342-343 [184 Cal.Rptr. 571].)

We conclude that there is no evidence of a substantial nature that either the transfer of stock or the attendant change of position by Mrs. Kruse was a proximate cause of her financial loss.

**B.**

**Interference with Economic Advantage**

Mrs. Kruse's claim of intentional interference with prospective economic advantage, while not well formulated, rests on a theory that the Bank's refusal to provide long-term financing and its efforts to liquidate the O'Connell Company destructively interfered with the relationship between Mrs.

19 Parenthetically, we have taken judicial notice that the trustee-in-bankruptcy has filed a lawsuit in federal court against the Bank seeking damages in behalf of the corporate entity, the O'Connell Company.

Kruse and the corporation. But the theory asserted amounts to nothing more than an indirect attempt to assert damages to the corporation which Mrs. Kruse lacked standing to do. (*Sutter v. General Petroleum Corp.*, *supra*, 28 Cal.2d at p. 530.)

In her brief, she declares that the interference occurred "when the Bank induced plaintiff to pledge her stock to the Jewell family by promising that it would finance the O'Connell project . . . . [which it] refused to do . . . leaving [her] powerless to regain control of her company."

To the extent that the argued interference was directed to the unkept promise of long-term financing, Mrs. Kruse failed to establish a cause of action. The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*. (*Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 998-999 [135 Cal.Rptr. 720]; *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288 [186 Cal.Rptr. 184]; see also Prosser & Keeton, The Law of Torts, *supra*, section 129, p. 978; Rest.2d Torts, section 766.) Here, however, only two parties were involved: the O'Connell Company, anxiously hoping for the bank loan, and the Bank

itself which, through a convoluted reasoning process, is charged with interference by denying the loan.

The presence of the Jewells does not fulfill the third party requirement. In the context presented, the Bank's alleged promise was to provide long-term financing directly to the O'Connell Company, *not* to the Jewells. And, at the risk of repetition, it bears emphasis that George M. Jewell consistently rejected any suggestion to obtain financing by encumbering the ranch.

While wrongful interference with one's *own* business may arguably constitute a breach of contract, it cannot serve as the basis of the claimed tort liability. Indeed, interference with business relations is ordinarily privileged if one has a financial interest in one of the parties. (*Culcal Stylco, Inc. v. Vornado* (1972) 26 Cal.App.3d 879, 882 [103 Cal.Rptr. 419]; Rest.2d Torts, section 769.) The Bank's refusal to extend

long-term financing to the O'Connell Company, even if that refusal amounted to an outright repudiation of a firm commitment, does not give rise to tort liability for interference with an economic advantage.[20]

## C.

## Emotional Distress

The jury awarded Mrs. Kruse $100,000 in damages for intentional infliction of emotional distress. Yet, the precise legal basis supporting the claim eludes comprehension. Mrs. Kruse argues that the Bank's liability arises from its deliberate conduct with the knowledge she lived on property owned by the O'Connell Company whose bankruptcy would subject her to the threat of being evicted and homeless. But the nature of the Bank's misconduct upon which the admittedly sympathetic plaint is grounded remains unclear.

20 Mrs. Kruse alternatively claims the Bank wrongfully interfered with the relationship between the O'Connell Company and George R. Jewell, its majority shareholder. She theorizes that by denying the long-term loan, the Bank prevented the corporation from paying its indebtedness to the Jewells forcing the latter to liquidate the corporation. The trial court, as noted, correctly determined that Mrs. Kruse could not seek recovery of damages for any injury to the corporation by reason of her lack of standing to do so. (*Sutter v. General Petroleum Corp.*, *supra*, 28 Cal.2d 525.) The claim lacks merit.

Insofar as the claim for emotional distress is based on the same conduct alleged to show fraud, no recovery is permitted. Emotional distress is not recoverable as an element of damages for fraud. (*Channel v. Anthony* (1976) 58 Cal.App.3d 290, 315 [129 Cal.Rptr. 704]; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 159 [119 Cal.Rptr. 245].)

Insofar as the claim is directed to the Bank's efforts to liquidate the O'Connell properties, the conduct was privileged. A party is not subject to liability for infliction of emotional distress when it has merely pursued its own economic interest and properly asserted its legal rights. (See *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 395 [89 Cal. Rptr. 78, 47 A.L.R.3d 286]; see also Rest.2d Torts, section 46, com. g, p. 76.)

Here, the Bank's interest in liquidating the O'Connell properties was an act of economic self-interest. The trust deeds on the O'Connell properties had been assigned to the Bank by the Jewells. Without liquidating the O'Connell properties, the Jewells would have been unable to repay the debts owed by them to the Bank.

Of course, the Bank's actions in its own interest are circumscribed in scope and may not be undertaken in an impermissible manner. (See *Fletcher v. Western National Life Ins. Co.*, *supra*, 10 Cal.App.3d 376.) But there is no cognizable showing that the Bank acted in an illegal or impermissible fashion. There were no threats or words of abuse directed toward the plaintiff. (Cf. *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908-909 [215 Cal.Rptr. 679, 701 P.2d 826] [public ridicule and use of profanities]; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 [86 Cal. Rptr. 88, 468 P.2d 216] [racial insult and wrongful discharge]; *Golden v. Dungan* (1971) 20 Cal.App.3d 295 [97 Cal.Rptr. 577] [midnight visits by process server]; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784 [193 Cal.Rptr. 671] [demands for payment while plaintiff lay in hospital bed].) In fact, Mrs. Kruse had no contact with the Bank and its officials, directly or otherwise. The Bank's "conduct" consisted of statements by Bunch made to *others*: to George M. Jewell urging liquidation proceedings and to Dan O'Connell and his sister

pointing out the need to sell the O'Connell properties.[21] While Bunch's heartless and insensitive remarks merit opprobrium, they do not qualify as the kind of "outrageous" conduct necessary to support an action for intentional infliction of emotional distress.[22] (See e.g., *Davidson v. City of Westminster* (1982) 32 Cal.3d 197 [185 Cal.Rptr. 252, 649 P.2d 894]; *Cortez v. Macias* (1980) 110 Cal.App.3d 640 [167 Cal.Rptr. 905].)

In summary, we conclude that Mrs. Kruse has failed to establish by substantial evidence that the Bank was in any manner legally responsible for her tragic plight. Accordingly, the judgment in her favor based upon a verdict of fraud, interference with economic advantage or infliction of emotional distress must be reversed.

21 When a question arose whether Dan O'Connell's sister, a licensed real estate broker should act as broker in the liquidation sale, Bunch bluntly questioned her "guts" to sell her mother's house.

22 Testimony that Bank officials knew as early as 1974 that an execution sale of her home would be "upsetting" possessed little relevance as to whether the now challenged conduct was outrageous in legal contemplation. Perhaps all that can be said is that the axis of the financial world turns more on economic reality than human compassion.

In view of our dispositive determinations in the matters before us, we need not discuss the remaining issues raised on appeal.

The judgments, and each of them, are reversed. The cross-appeals are dismissed as moot. Costs are awarded to the Bank.

Elkington, J., and Newsom J., Concurred.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION ONE**

IRENE O'CONNELL KRUSE,

*Plaintiff and Appellant,*

AO 33064, AO 39161
(Sonoma County Super. Ct. No. 112439)

v.

BANK OF AMERICA,

*Defendant, Cross-Defendant and Appellant;*

CHARLES DUCK, as Trustee, etc., et al.,

*Cross-Complainants and Appellants.*

---

The requests for disqualification of the named justices and of the panel, as contained in plaintiff and appellant Irene O'Connell Kruse's Request That the Justices of Division One Grant Rehearing and Disqualify and Recuse Themselves, and in cross-complainants and appellants Charles Duck's and George R. Jewell's Petition for Disqualification

**APPENDIX B**

Or In the Alternative Petition for Rehearing, have been duly considered as separate and independent motions to disqualify the individual justices therein designated. Said requests, filed during the pendency of the moving parties' petitions for rehearing, present no basis for disqualification, and each and all are denied. (See *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-940.)

Dated: June 17, 1988

_____

Racanelli, P. J.

_____

Newsom, J.

_____

Elkington, J.

**ORDER DENYING REVIEW**

**AFTER JUDGMENT BY THE COURT OF APPEAL**

**First District, Division One, No. AO33064, AO39161**

**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

**IN BANK**

---

KRUSE, Appellant

v.

BANK OF AMERICA, Appellant;

DUCK ETC., ET AL., Appellants

**LUCAS, C.J. AND PANELLI, J., DID NOT PARTICIPATE.**

---

The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law.

The petitions for review are DENIED.

_____

Acting Chief Justice

## APPENDIX C

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on November 30, 1988, I served the within *Petition for a Writ of Certiorari to the California Court of Appeal, First Appellate District, Division One,* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
*(Original and forty copies)*

Frederick N. Watson
Attorney at Law
1111 Civic Drive,
Suite 300
Walnut Creek, California 94596

William Lukens
Lukens, Perry,
Drummond & Cooper
One Maritime Plaza
San Francisco, CA 94111

Bert Cooper
O'Melveny & Myers
400 S. Hope Street
Los Angeles, CA 90071-2899

I declare under penalty of perjury that the foregoing is true and correct. Executed on November 30, 1988, at Los Angeles, California.

Betty J. Malloy
*(Original signed)*

Supreme Court, U.S.
FILED
DEC 23 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-918 (2)

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

*Respondent.*

No. 88-934 (2)

IRENE O'CONNELL KRUSE,

*Petitioner,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

*Respondent.*

## OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

DAVID B. FLINN
LELAND, PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK
333 Market Street
27th Floor
San Francisco, CA 94105
Telephone: (415) 457-1800

WARREN CHRISTOPHER*
BERTRAND M. COOPER
KAREN R. GROWDON
CARMEN R. LUEGE
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, CA 90071
Telephone: (213) 669-6000

*Attorneys for Respondent*

* *Counsel of Record*

74pp

## TABLE OF CONTENTS


| | | PAGE |
|---|---|---|
| TABLE OF AUTHORITIES | | ii |
| STATEMENT OF THE CASE | | 2 |
| 1. | *Facts Underlying Petitioners' Claims Of Judicial Disqualification* | 2 |
| 2. | *The Facts Of The Case* | 5 |
| REASONS FOR DENYING THE WRITS | | 6 |
| 1. | *The Judgment Below Is Not Final* | 6 |
| 2. | *Petitioners Did Not Raise The Questions Presented In The State Court Proceedings* | 7 |
| 3. | *The Case Does Not Present Important Questions Of Law* | 9 |
| 4. | *The Lower Court's Decision Does Not Conflict With Decisions Of This Court* | 10 |
| 5. | *The Lower Court's Decision Neither Interprets Nor Applies Federal Law On Judicial Disqualification* | 11 |
| 6. | *Alleged Error In The Lower Court's Decision Does Not Justify Review By This Court* | 12 |
| CONCLUSION | | 13 |

## TABLE OF AUTHORITIES


| CASES | PAGE(S) |
|---|---|
| *Adickes v. S.H. Kress and Co.*, 398 U.S. 144 (1970) ... | 8 |
| *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) ... | 8, 9, 10 |
| *Agins v. City of Tibuoan*, 447 U.S. 255 (1980) ... | 11 |
| *Beck v. Washington*, 369 U.S. 541, *Reh. denied*, 370 U.S. 965 (1962) ... | 8 |
| *Berger v. United States*, 255 U.S. 22 (1921) ... | 12 |
| *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987) ... | 8 |
| *Cardinale v. Louisiana*, 394 U.S. 437 (1969) ... | 8 |
| *Chambers v. Mississippi*, 410 U.S. 284 (1973) ... | 8 |
| *Cincinnati Street Railway Co. v. Snell*, 179 U.S. 395 (1900) ... | 6 |
| *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) ... | 7 |
| *Flynt v. Ohio*, 451 U.S. 619 (1981) ... | 7 |
| *Gospel Army v. Los Angeles*, 331 U.S. 543 (1947) ... | 6 |
| *Herndon v. Georgia*, 295 U.S. 441 (1935) ... | 8 |
| *Hill v. California*, 401 U.S. 797 (1971) ... | 8 |
| *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America*, 325 U.S. 897 (1944) ... | 11 |
| *Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982) ... | 5, 11 |
| *Killian v. United States*, 368 U.S. 231 (1961), *Reh. denied*, 368 U.S. 979 (1962) ... | 8, 9 |
| *Kruse v. Bank of America*, 202 Cal. App. 3d 38, 248 Cal. Rptr. 217 (1988) ... | 2 |
| *Laird v. Tatum*, 409 U.S. 824 (1972) ... | 11 |
| *Liljeberg v. Health Services Acquisition Corp.*, 108 S.Ct. 2194 (1988) ... | 10, 11 |
| *MacNeil Bros. Co. v. Cohen*, 264 F.2d 186 (1st Cir. 1959) ... | 12 |
| *Martin-Trigona v. Gouletas*, 634 F.2d 354 (7th Cir.) *cert. denied*, 449 U.S. 1025 (1980) ... | 12 |
| *O'Dell v. Espinoza*, 456 U.S. 430 (1982) ... | 6 |
| *Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897) ... | 8 |

| CASES | PAGE(S) |
|---|---|
| *Patterson v. Colorado ex rel Attorney General*, 205 U.S. 454 (1907) | 11 |
| *Popkin v. Eastern Air Lines, Inc.*, 236 F.Supp. 645 (E.D. Penn. 1964) | 5 |
| *Ross v. Moffitt*, 417 U.S. 600 (1974) | 13 |
| *Tumey v. Ohio*, 273 U.S. 510 (1927) | 8, 9 |
| *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979) | 12 |
| *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980) | 12 |
| *Webb v. Webb*, 451 U.S. 493 (1981) | 7 |
| *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980) | 7, 8 |

| STATUTES | |
|---|---|
| 28 U.S.C. § 144 | 12 |
| 28 U.S.C. § 1257 | 6 |
| California Code of Civil Procedure | |
| § 170.1 | 3, 5 |
| § 170.1(a)(3) | 3 |
| § 170.3 | 12 |
| § 170.5(b) | 3 |
| § 473 | 5 |
| California Government Code | |
| § 87200 | 3 |
| § 87203 | 3 |
| § 83113 | 3 |
| Code of Judicial Conduct, Canon 5C(4)(b) | 4 |

| SECONDARY MATERIALS | |
|---|---|
| R. Stern, E. Grossman and S. Shapiro, *Supreme Court Practice* § 4.1 (6th ed. 1986) | 13 |
| B. Witkin, California Procedure, *Courts* § 80 (3rd ed. 1985) | 4 |

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

---

**No. 88-918**

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

*Respondent.*

---

**No. 88-934**

IRENE O'CONNELL KRUSE,

*Petitioner,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

*Respondent.*

---

## OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE

---

Respondent Bank of America N.T. & S.A.* ("the Bank") respectfully requests that this Court deny the petition for writ of

* Bank of America N.T. & S.A. owns less than a 100% interest in the following of its subsidiaries: Banco Colombo Americano, Bank of America Australia Limited, Bank of America S.A.E., Bank of America (France) S.A.,

*(Footnote Continued)*

certiorari filed by Charles Duck, bankruptcy trustee of the estate of George M. Jewell and Laura E. Jewell, and by George R. Jewell (the "Jewells") and the petition for writ of certiorari filed by Irene O'Connell Kruse ("Kruse"). Both petitions seek review of the opinion of the California Court of Appeal, First Appellate District, Division One filed on May 18, 1988, and modified on June 17, 1988.

## STATEMENT OF THE CASE

On May 18, 1988, the California Court of Appeal issued its opinion in *Kruse v. Bank of America* (as later modified and reported at 202 Cal. App. 3d 38, 248 Cal. Rptr. 217 (1988)). That opinion reversed the trial court judgment in favor of petitioners. The decision was rendered by a panel composed of Justices John T. Racanelli, William A. Newsom and Norman Elkington.

The Court of Appeal found that Kruse and the Jewells had not established by substantial evidence the causes of action alleged in their pleadings. The decision to reverse the judgment was entirely based on established state law principles and did not raise any federal issues or constitutional questions.

Petitioners seek the aid of this Court by legal maneuvers aimed at creating a constitutional question where none in fact exists. Notably, petitioners' briefs contain only a sketchy account of the facts and procedures giving rise to the alleged constitutional questions—perhaps because those facts reveal the frivolous nature of the petitions.

### 1. Facts Underlying Petitioners' Claims Of Judicial Disqualification.

Petitioners first raised the issue of judicial disqualification *after* the Court of Appeal rendered its decision. While petitioners' motions for rehearing were pending before the Court of Appeal, Kruse filed a motion requesting that Justice Racanelli and Justice Newsom recuse themselves. Kruse claimed that,

---

*(Footnote Continued)*

BA Servicios, S.A., East Kemptville Tin Corporation, and The Electronic Payments Exchange, Inc. Bank of America N.T. & S.A. is itself wholly owned by BankAmerica Corporation, all of the subsidiaries of which are wholly owned.

while the appeal was pending, Justice Racanelli owned Bank stock and Justice Newsom had a "customline" of credit with the Bank. The purported factual basis of those assertions was the belated recollection of Kruse's counsel that at an unrelated hearing involving the Bank in April 1986 Justices Racanelli and Newsom disclosed, respectively, stock ownership in and a loan from the Bank. After Kruse filed her motion for recusal, the Jewells immediately filed their own request based entirely on the declaration filed by Kruse's counsel.

Only days later, Kruse filed an additional brief raising more unsubstantiated accusations. This time Kruse theorized that Winslow Christian, the Bank's Director of Litigation, had recommended Justice Racanelli, Justice Elkington and Justice Newsom to be appointed to the Court of Appeal. Kruse also speculated that Justice Racanelli may have been influenced by a hope that Warren Christopher, the Bank's counsel who argued the appeal, might somehow obtain a federal judicial appointment for the Justice if Governor Dukakis won the presidential election. Appendix A. On June 17, 1988, the Court of Appeal declined petitioners' recusal requests as well as the petitions for rehearing, and the court issued its modified opinion making minor editorial changes.

Kruse and the Jewells then filed petitions for review in the California Supreme Court essentially requesting review of the Justices' refusal to disqualify themselves. Kruse also filed an application to take evidence on the disqualification issue. On June 30, 1988, Justice Racanelli submitted a declaration to the California Supreme Court establishing beyond dispute that he had never owned Bank stock. Appendix B. Obviously, that declaration put to rest the issue of Justice Racanelli's disqualification.[1]

---

[1] By statute, a judge's ownership of less than 1% of a party's stock, or of such stock worth less than $1,500, is not a disqualifying interest. California Civil Procedure Code §§ 170.1(a)(3), 170.5(b). Justice Racanelli's Statements of Economic Interest filed pursuant to California Government Code § 87200 for the years 1986 and 1987 do not indicate any ownership of Bank stock. (Under California Government Code § 87203 appellate court judges are annually required to disclose their investments and income during the preceding year. The disclosure is made on "Form 721," the Statement of Economic Interest, issued by the Fair Political Practices Commission under authority of California Government Code § 83113.)

As to Justice Newsom's loan from the Bank, since the 1984 revisions to the California judicial disqualification statutes, a loan is no longer a disqualifying financial interest. California Civil Procedure Code Section 170.1; 2 B. Witkin, California Procedure, *Courts § 80 (3rd ed. 1985)*.[2] *See also* Code of Judicial Conduct, Canon 5C(4)(b) (a loan is not a disqualifying interest if obtained in the "regular course of business on the same terms generally available to persons who are not judges"). Since the evidence presented did not establish any ground for disqualification, the California Supreme Court denied petitioners' requests for review, as well as the application to take evidence, finding that petitioners had "not made a prima facie showing of conflict of interest or bias much less a deprivation of due process."

Faced with the absence of any basis in the record for disqualifying Justice Racanelli or Justice Newsom, Kruse now makes entirely new accusations concerning Justice Newsom. In her petition Kruse claims that David Flinn, the Bank's trial attorney in this case, is the family lawyer for Justice Newsom, and that this constitutes ground for disqualification. That again exemplifies petitioners' creation of innuendo without any factual basis.

As a threshold matter, we note that the alleged lawyer/client relationship between Justice Newsom and Flinn constitutes entirely new matter never raised below. Neither Justice Newsom nor the California Supreme Court has had an opportunity to consider that matter. To the extent this Court is inclined to consider it, however, the Bank wishes to correct Kruse's false allegations.

Kruse's conclusion that Flinn was Justice Newsom's attorney is simply not supported by the evidence on which Kruse relies. Her argument springs from two "facts": (1) Justice Newsom's apparent ownership of stock in Squaw Valley Improvement Corporation, as reflected in his 1982 Statement of Economic Interest, and (2) Flinn's representation of that corporation as reflected in its Statement of Domestic Stock Corporation filed with the California Secretary of State in June 1982. Kruse unjustifiably assumes from those two documents

---

[2] Although Justice Newsom's Statements of Economic Interest revealing the existence of the creditline were available for inspection at all times, petitioners waited until after the Court of Appeal rendered its decision to raise the disqualification issue.

that Flinn represented the Corporation when Justice Newsom was one of its stockholders.[3] That assumption is wrong. In May of 1982, Justice Newsom, in an arms-length transaction, sold all his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Appendix C.[4] In June of 1982, *after* the sale, Justice Newsom's sisters employed Flinn to dissolve the corporation. It was only after Justice Newsom's sale of shares that Flinn's law firm commenced representation of the corporation. Flinn is not and never has been counsel for Justice Newsom.[5] Appendix C.

## 2. The Facts Of The Case.

This case arose out of a complex lending relationship between the Bank, the Jewells and the O'Connell Company (of which Kruse was sole shareholder). The litigation commenced in 1981 when the Jewells and the O'Connell Company, faced with financial collapse, filed claims against the Bank alleging fraud, breach of the covenant of good faith and fair dealing and other torts. The California Court of Appeal, applying state law, found that petitioners did not establish at trial their claims of tortious conduct on the part of the Bank.

---

[3] Even if Mr. Flinn had been Justice Newsom's lawyer, there would be no ground for disqualification under California Civil Procedure Code § 170.1. *See also Popkin v. Eastern Air Lines, Inc.*, 236 F.Supp. 645 (E.D. Pa. 1964). But if Kruse truly believes these allegations constitute a ground for disqualification, she should have raised that issue first with Justice Newsom himself by seeking to vacate the decision under California Civil Procedure Code § 473. *See Kaufman v. Court of Appeal*, 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982).

[4] Because the record contains no evidence on this new issue, the Bank proffers in the Appendix David Flinn's declaration explaining his involvement with Squaw Valley Improvement Corporation.

[5] Justice Newsom's name appears in the 1982 Statement of Domestic Corporation filed by Squaw Valley only in the prestamped address placed upon the document by the Secretary of State. Justice Newsom appears as the addressee of the form simply because the Secretary of State records for 1981 showed Justice Newsom's office as the "corporate office." Appendix C.

The complex facts underlying petitioners' original claims against the Bank are irrelevant to this Court's decision on the petitions for certiorari. Those facts raise no federal issues or questions of constitutional dimension. Suffice it to note that Kruse's statement of facts is quite misleading. For an accurate explanation of the underlying facts, this Court can look to the summary contained in the opinion of the California Court of Appeal, attached as Appendix A to Kruse's Petition for Certiorari.

## REASONS FOR DENYING THE WRITS

### 1. The Judgment Below Is Not Final.

Under 28 U.S.C. Section 1257, Supreme Court review of state court decisions is available only with respect to "final judgments or decrees." This Court has often applied the precept that a decision reversing a case and remanding it for further proceedings is "totally wanting in the requisite finality required to support a writ of error from this court." *Cincinnati Street Railway Co. v. Snell,* 179 U.S. 395, 397 (1900). *See also O'Dell v. Espinoza,* 456 U.S. 430 (1982); *Gospel Army v. Los Angeles,* 331 U.S. 543 (1947). Here the Court of Appeal reversed the judgment, and that had the effect of remanding the case to the trial court for further judicial proceedings.[6] Accordingly, petitioners are not seeking review of a "final" judgment or decree.

Petitioners may argue that this Court has granted certiorari to review interlocutory decisions. Those grants, however,

[6] Pending before the trial court is the Bank's motion for immediate entry of judgment, or alternatively for summary judgment. The trial court's disposition of those motions will likely give rise to further proceedings in either the trial or appellate court in California.

represent the exception, not the rule. For review of an interlocutory decision, the case must fall under one of the four exceptions to the finality requirement articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

The petitioners do not even address the finality issue, much less assert any of the *Cohn* exceptions. Both Kruse and the Jewells, however, suggested to the trial court that the fourth *Cohn* exception applies to their situation.[7] That fourth exception permits interlocutory review when, among other things, (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action" *and* (2) failure to consider the state court decision immediately "might seriously erode federal policy." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 482-483. Petitioners cannot establish either prerequisite.

Resolution of the questions presented here will not preclude further litigation. Disqualifying the justices who decided the instant case would only have the effect of remanding the case back to the California appellate courts. Moreover, immediate resolution is not required to prevent erosion of federal policy. As this Court stated in *Flynt v. Ohio*, 451 U.S. 619, 622 (1981), in applying the fourth exception, it is important that the "exception [should not] swallow the rule." This case gave rise to no state court opinion at all interpreting federal law which will seriously erode federal policy, much less to such a decision requiring immediate consideration by this Court. Not falling under the fourth or any other *Cohn* exception, petitioners' requests for review should be denied.

## 2. Petitioners Did Not Raise The Questions Presented In The State Court Proceedings.

Petitioners cannot satisfy the requirement that a substantial federal question must have been properly raised in the state court proceeding. *See, e.g., Webb v. Webb*, 451 U.S. 493, 494-

[7] Petitioners obtained a stay of proceedings in the trial court to pursue their petitions for certiorari. The Bank opposed the stay on the ground that this Court was not likely to issue a writ of certiorari because of lack of finality of the decision below. Petitioners filed a reply in which they suggested that the fourth *Cohn* exception applied.

498 (1981); *Hill v. California*, 401 U.S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U.S. 437, 439 (1969). The Jewells' Petition for Certiorari in this Court raises for the first time a due process issue under the Fourteenth Amendment. Never during the state court proceedings did the Jewells frame a federal constitutional question. The Jewell's Petition for Review in the California Supreme Court stated the question only as follows: "Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?" Appendix D. As this Court has found, "[a]ll questions of judicial qualification may not involve constitutional validity." *Tumey v. Ohio*, 273 U.S. 510, 523 (1927). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 821 (1986).

In the court below, the Jewells did not brief or address the due process implications of the alleged disqualification issue. Their failure to do so waived their constitutional claim. *Chambers v. Mississippi*, 410 U.S. 284, 290-291 n.3 (1973); *Beck v. Washington*, 369 U.S. 541, 553, *reh'g denied*, 370 U.S. 965 (1962). Having failed to raise the constitutional issue before the California Supreme Court, the Jewells cannot now seek redress in this Court for any alleged due process violation.[8]

Likewise, Kruse's petition for certiorari raises an issue not presented in the state court proceedings: the alleged (but mistaken) "newly discovered" lawyer/client relationship between Justice Newsom and the Bank's trial counsel. Neither the California Court of Appeal nor the California Supreme Court had an opportunity to consider (much less resolve) the essential factual predicate of the question presented, and so this Court should not review the issue. *See Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 158 n.16 (1970); *Killian v. United*

[8] The Jewells did not overcome this jurisdictional impediment by citing United States Supreme Court cases to the California Supreme Court on the disqualification issue. Such citations do not satisfy the jurisdictional requirement. *See Herndon v. Georgia*, 295 U.S. 441, 442-43 (1935); *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537, 107 S.Ct. Rptr. 1940, 1948 n.9 (1987). Neither do passing references to "constitutional dimensions" without actually briefing the constitutional point. *See Oxley Stave Co. v. Butler County*, 166 U.S. 648 (1897); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980).

*States*, 368 U.S. 231, 243 (1961), *reh'g denied*, 368 U.S. 979 (1962).

3. **The Case Does Not Present Important Questions of Law.**

Kruse asserts that the case presents a question of first impression: the degree or kind of interest on the part of a judge which violates due process. The mere lack of a Supreme Court ruling on a question has never been recognized as a basis for the grant of certiorari. More importantly, Kruse's characterization of the questions presented as an issue of first impression is misleading.

As the Jewells recognize in their petition, on more than one occasion this Court has explained the relationship between the due process clause of the Fourteenth Amendment and judicial disqualification. In *Tumey v. Ohio*, 273 U.S. 510, 523 (1927), for example, this Court stated:

> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. [citation omitted] But it certainly violates the Fourteenth Amendment, . . . to subject [a person's] liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

And more recently in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 822 (1985), this Court, reaffirming settled principles, explained that:

> [W]hat degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision.' [citation omitted.] Nonetheless, a reasonable formulation of the issue is whether the 'situation is one which would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.' [citation omitted].

Kruse also contends that the court should decide the issue of the effect of disqualification of a single appellate justice when

the decision is rendered by a three judge panel. Whether or not this issue is one of first impression, this case is an inappropriate vehicle to review it because Kruse's claims of prejudice are predicated upon unsettled facts never raised below.

**4. The Lower Court's Decision Does Not Conflict With Decisions Of This Court.**

The Jewells, unlike Kruse, acknowledge that this Court has set forth the due process standards requiring judicial disqualification. They merely claim that the Court of Appeal did not follow those standards when it refused to disqualify Justices Newsom and Racanelli.

The refusal of Justices Newsom and Racanelli to recuse themselves comports with decisions of this Court. Recently this Court rejected the view that "the slightest pecuniary interest" constitutes a violation of the Due Process Clause. *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 825-826 n.3. Instead, the Court held that recusal is required where there is "a direct, personal, substantial, pecuniary interest." Applying that principle leads to the inevitable conclusion that Justices Racanelli and Newsom did not violate the due process clause by refusing to disqualify themselves. Justice Racanelli has never owned any Bank stock and Justice Newsom's small creditline does not constitute "a substantial pecuniary interest" so as to cause the judge "not to hold the balance, nice, clear and true." *Aetna Life Insurance Co. v. Lavoie,* 475 U.S. at 822.

The Jewells suggest that the affidavits they filed questioning the justices' qualifications should suffice for recusal regardless of their truthfulness. Contrary to the Jewells' assertion, *Liljeberg v. Health Services Acquisition Corp.*, ____ U.S. ____, 108 S.Ct. 2194 (1988), does not support such a conclusion. In *Liljeberg* the trial judge in fact had a disqualifying interest in the litigation.[9] *Liljeberg,* 108 S.Ct. at 2196, 2203. The rule suggested by the Jewells would result in a clear abuse. Every losing appellant could disqualify appellate justices and vacate

[9] *Liljeberg* is also distinguishable in that it involved interpretation of 28 U.S.C. § 455 and not the due process clause of the Fourteenth Amendment.

an adverse decision by simply filing affidavits questioning the justices' qualifications. Under the rule proposed by the Jewells, the justices would have to recuse themselves regardless of the truthfulness of the allegation. Certainly the Court in *Liljeberg* did not intend to create such an artifice.

### 5. The Lower Court's Decision Neither Interprets Nor Applies Federal Law On Judicial Disqualification.

Both Kruse and Jewells seek certiorari because the Justices, in refusing to recuse themselves, relied on the California Supreme Court decision in *Kaufman v. Court of Appeal,* 31 Cal. 3d 933, 184 Cal. Rptr. 302 (1982), which, according to petitioners, wrongly interpreted federal law. *Kaufman* rejected the claim that a California appellate justice cannot decide the issue of his own disqualification. Instead, *Kaufman* held that an appellate justice in California should decide individually whether the facts require recusal, and that the higher court only determines whether bias rendered the appellate proceeding unfair.

Contrary to petitioners' position, *Kaufman* neither interprets nor applies federal law; instead, it establishes the California rule (which the court mentioned was comparable to the federal rule). This Court does not grant certiorari to review questions of state law. *See Agins v. City of Tibuoan,* 447 U.S. 255, 260-261 n.6 (1980); *Patterson v. Colorado ex rel. Attorney General,* 205 U.S. 454, 461 (1907).

Petitioners suggest that the *Kaufman* rule violates due process, but the federal practice is fully consistent with *Kaufman.* Faced with a motion for recusal federal appellate judges individually decide whether disqualification is required. In *Jewell Ridge Coal Corp. v. Local No. 6167, United Mine Workers of America,* 325 U.S. 897 (1944), Justice Jackson stated that it is "the responsibility of each Justice to determine for himself the propriety of withdrawing in any particular circumstances." Justice Jackson noted that the majority of the Court lacked the power to exclude any of its duly commissioned Justices from sitting or voting in any case. Almost thirty years later Justice Rehnquist, when faced with a motion for disqualification, individually decided the disqualification issue.

*See Laird v. Tatum*, 409 U.S. 824 (1972). In refusing to recuse himself, Justice Rehnquist considered and weighed facts within his own knowledge. Challenged for disqualification, federal circuit judges follow the same procedure. *See, e.g., MacNeil Bros. Co. v. Cohen*, 264 F.2d 186, 189 (1st Cir. 1959); *Martin-Trigona v. Gouletas*, 634 F.2d 354, 355 n.1 (7th Cir.) *cert. denied*, 449 U.S. 1025 (1980).

Petitioners misleadingly rely on cases like *Berger v. United States*, 255 U.S. 22 (1921), *United States v. Sibla*, 624 F.2d 864 (9th Cir. 1980) and *United States v. Gigax*, 605 F.2d 507 (10th Cir. 1979) for the proposition that a judge challenged for bias can only decide the legal sufficiency of the affidavit and not the truthfulness of the allegations. Those cases, however, involved a unique statutory procedure applicable only to trial judges. Under both federal and California law trial judges pass only upon the sufficiency of the affidavit. If the affidavit is sufficient, the judge must refer the matter to another judge for determination of the merits. *See* 28 U.S.C. § 144; Cal. Civil Proc. Code § 170.3.

6. **Alleged Error In The Lower Court's Decision Does Not Justify Review By This Court.**

The Jewells suggest error in the decision below without specifying the nature of the error. Jewell's Petition pp. 15-16. Kruse argues that the Court of Appeal erred by failing to review the case in light of the actual legal theories upon which she relied. Kruse's Petition at pp. 13, 17. Kruse's claim boils down to arguing that the court simply misinterpreted her position. While undoubtedly such a sentiment is shared by most unsuccessful appellants, it certainly does not justify review by this Court. As the Justices of this Court have explained:

> The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions . . . . The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise

> supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court.

R. Stern, E. Grossman and S. Shapiro, *Supreme Court Practice* § 4.1, at 190-191 (6th ed. 1986), citing Address of Chief Justice Vinson before American Bar Association, September 7, 1949. *See also Ross v. Moffitt*, 417 U.S. 600, 616-17 (1974). Petitioners' belief that the court below erroneously applied state law is not a proper ground for certiorari.

## CONCLUSION

For all the foregoing reasons, petitioners' requests for certiorari should be denied.

DATED: December 22, 1988

Respectfully submitted,

WARREN CHRISTOPHER
BERTRAND M. COOPER
KAREN R. GROWDON
CARMEN R. LUEGE
O'MELVENY & MYERS

DAVID B. FLINN
LELAND, PARACHINI,
STEINBERG, FLINN,
MATZGER & MELNICK

By Warren Christopher

*Attorneys for Respondent*

# APPENDIX


| | | PAGE |
|---|---|---|
| A | Plaintiff-Respondent and Cross-Appellant Irene O'Connell Kruse's Amendment to Request That The Justices of Division One Grant Rehearing and Recuse Themselves, And Memorandum of Points and Authorities in Support of Request | 1 |
| B | Declaration of John T. Racanelli Addressed To California Supreme Court | 8 |
| C | Affidavit of David B. Flinn | 22 |
| D | Petition for Review of Decision of the Court of Appeal, First Appellate District, Division One | 24 |

## APPENDIX A

Civil No. A033064/A039161

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

IRENE O'CONNELL KRUSE
*Plaintiff, Respondent, and Cross-Appellant,*

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,
*Defendant, Appellant, and Cross-Respondent.*

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

# PLAINTIFF-RESPONDENT AND CROSS-APPELLANT IRENE O'CONNELL KRUSE'S AMENDMENT TO REQUEST THAT THE JUSTICES OF DIVISION ONE GRANT REHEARING AND RECUSE THEMSELVES, AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF REQUEST


LUKENS, COOPER, PERRY & DRUMMOND
WILLIAM M. LUKENS
CAROL G. PERRY
MARTHA ROSENBERG
The Alcoa Building Suite 1200
One Maritime Plaza
San Francisco, California 94111
Telephone: (415) 433-2261

FREDERICK E. WATSON
A Professional Corporation
FREDERICK E. WATSON
1111 Civic Drive, Suite 300
Walnut Creek, California 94596
Telephone: (415) 947-0393

KHOURIE & CREW
EUGENE CREW
MICHAEL N. KHOURIE
101 California, Suite 1500
San Francisco, California 94111

*Attorneys for Plaintiff, Respondent and Cross-Appellant Irene O'Connell Kruse*

C. **The Relationship and Long Acquaintance Between the Members of the Court, and Counsel for the Bank, is a Factor to Be Considered on the Issue of Impartiality:**

Martindale-Hubbell discloses that Mr. Warren Christopher, a senior partner of O'Melveny & Myers, who argued the appeals for the Bank, and former Justice Winslow Christian of this Court, were law school classmates at Stanford, and members of the Law Review, graduating together in 1949. In 1959, Mr. Christopher became special counsel to Governor Brown, Sr. From 1964 through 1966, Winslow Christian was the executive secretary to Governor Brown, Sr., and we are informed and believe that in that position Mr. Christian recommended judicial appointments to the Governor, and one of the appointments made in 1964 by Governor Brown was the appointment of Justice Racanelli to the Santa Clara County Superior Court bench.

In 1966, Governor Brown appointed Winslow Christian and Norman Elkington to the Court of Appeal for the First Appellate District, and it is perhaps a reasonable inference that Winslow Christian, as executive secretary, recommended his own appointment, and the appointment of Justice Elkington. It thus appears to be a reasonable inference that both Justice Elkington and Justice Racanelli may have received their appointments to the Court of Appeal and the Santa Clara County Superior Court, respectively, as a result of recommendations by Mr. Winslow Christian.

Justice Racanelli was appointed to the Court of Appeal by Governor Brown, Jr., in 1977, and a year later Justice Newsom was appointed to the Court of Appeal by Governor Brown, Jr., in 1978. We have at this time no information as to whether former Justice Winslow Christian recommended, or played any role in the appointment of, Justices Racanelli and Newsom to the Court of Appeal, but we submit it would not be unreasonable to assume that former Justice Christian may have played some part in recommending the appointments of Justices Racanelli and Newsom to the Court of Appeal, in view of Mr. Christian's former position as executive secretary to Governor Brown, Sr. during which time he may have recommended the appointment of Justice Racanelli to the Superior Court bench in 1964.

In 1984, Justice Christian resigned from the bench, and accepted a position as Director of Litigation in the Office of the General Counsel of the Bank of America, and has maintained his offices in the headquarters of the Bank in San Francisco, since that time. As Director of Litigation of the Bank, Mr. Christian has been in direct charge of this case and these appeals, and it was Mr. Christian who undoubtedly selected his law school classmate Mr. Christopher, and his lawfirm O'Melveny and Myers, to act as appellate counsel for the Bank, in the briefing and argument of these appeals. The selection of Mr. Christopher makes it necessary for this Court to consider certain other facts, concerning political and governmental activity and experience of the members of this Court, and counsel for the Bank, in order to comply with the principle that "a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street." (*United Farm Workers, supra*, 170 Cal.App.3d at 104). Those facts to be considered are as follows:

Mr. Christopher, for many years has been, and still is, very prominent and influential in Democratic party political circles, and has held state and federal governmental offices during Democratic administrations. As previously mentioned, he was special counsel to Governor Brown, Sr., in 1959. From 1961-1965, during the Kennedy and Johnson administrations, Mr. Christopher was legal counsel in the office of the Undersecretary of State. He was appointed as a United States Deputy Attorney General in 1967 during the Johnson administration, and served in that position until 1969, resigning then during the Republican Nixon administration. Mr. Christopher was appointed Deputy Secretary of State in 1977, during the Carter administration, and served until 1981, resigning then during the Republican Reagan administration.

Mr. Christopher is a member of the board of directors of First Interstate Bancorp., the parent company of First Interstate Bank. Mr. Christopher was Vice Chairman of Governor Brown Sr.'s commission on the Los Angeles Riots, 1965-1966, during the same time that former Justice Winslow Christian was executive secretary to Governor Brown, Sr. During the Ken-

nedy administration, Mr. Christopher was Chairman of the United States delegation to the U.S.-Japan Cotton Textile Negotiations in 1961, and during that same year attended the Geneva Conference on Cotton Textiles. During the Kennedy-Johnson administrations, Mr. Christopher was special representative of the Secretary of State for Wool Textile meetings, in London, Rome, Tokyo, during the years 1964-1965. From 1975 to 1977, Mr. Christopher was the chairman of the American Bar Association standing committee on the federal judiciary. (The foregoing information appears in the 1987-1988 edition of "Who's Who in American Law," at page 136).

In a reprint of a "Judicial Profile" dated October 6, 1981, originally published in the Los Angeles Daily Journal, and based on an interview with Justice Racanelli, it is stated:

> "... Racanelli's interest in judicial administration seems to be only a continuation of his interest in bar association work and party politics when he was an attorney. While in practice in Santa Clara County, Racanelli sat on the County Bar Association's Board of Directors and the County's Democratic Central Committee."

Further, in this Court's consideration of how Justice Racanelli's participation in these appeals looks to the average person on the street, we submit that there should be taken into consideration the comments of an attorney quoted in the same Judicial Profile, as follows:

> "... If Racanelli has been politically active in judicial administration, a few attorneys also claim he has been political in his decision-making. A deputy attorney general who handles civil work said he is 'much more suspicious of intrusion of political motives in what (Racanelli) does.'..."

Since January of 1981, Justice Racanelli has been the administrative presiding Justice of the Court of Appeal for the First Appellate District, charged with overseeing the operation of the entire appellate court in San Francisco. We submit that the average person on the street might reasonably conclude that it is a somewhat remarkable coincidence that Division One was assigned to handle the appeal in the *Sanchez-Corea v. Bank of*

*America*, and *In Re the Estate of Barberis* (i.e. *Barberis v. Bank of America*), and Division One was also assigned to handle the present appeals in *Kruse/Jewell v. Bank of America*. We submit the average person on the street might therefore reasonably assume that Justice Racanelli, as the administrative presiding Justice for this Court, may have had something to do with the assignment of those three appeals to Division One. The Bank of course prevailed on all three of those appeals in this Court, based upon an opinion by this Division in *Sanchez-Corea* that was identical, and a carbon copy, of the decision of this Division, on the present appeals, in that both *Sanchez-Corea* and the present appeals, this Division totally ignored the rules of appellate review, and did not view the evidence in the light most favorable to the prevailing party plaintiff that had recovered judgment against the Bank, and instead viewed the evidence in the light most favorable to the respondent Bank, and concluded that the evidence was insufficient to support the judgments against the Bank, and therefore reversed the judgments. In *Sanchez-Corea*, where the plaintiff was fortunate enough to obtain hearing in the Supreme Court, the Supreme Court applied the usual and proper standard and rules of appellate review, and in an opinion that presented a day and night difference and contrast to the opinion of this Division, held that there was abundant substantial evidence to support the judgment for fraud perpetrated upon the borrower-customer plaintiffs, by precisely the same Bank Regional Credit Office head (Timmerman) using precisely the same *modus operandi* as was used against Mrs. Kruse and the Jewells in the present case.

We submit that the average person on the street, aware of the foregoing facts, might reasonably assume that in participating in the decision on the present appeals, Justice Racanelli may have had difficulty putting completely out of his mind, the fact that his past very frequent assignments to sit pro tem on the Supreme Court, which apparently arose from his reputed close friendship with former Chief Justice Rose Bird, may well have ended, and that therefore, if Governor Dukakis is elected president, Mr. Christopher might be influential in obtaining for Justice Racanelli either appointment to the federal bench, or appointment to governmental position and post in a Dukakis administration.

We respectfully emphasize again, that the test to be applied by this Court is not whether in fact there is any such possibility of such events taking place; rather, the much more stringent test to be applied is whether the average person on the street might reasonably think that Justice Racanelli could consciously or subconsciously be influenced to favor the Bank in his decision on the present appeals, and public confidence in the integrity and absolute impartiality of the judiciary demands disqualification, where the average person on the street might entertain a reasonable doubt as to impartiality.

In summary, the three Justices comprising the panel that decided the present appeals, and reversed judgments totalling approximately $22 million against the Bank of America, were Justices Racanelli, Elkington and Newsom. Justices Racanelli and Newsom have in the past announced that they were disqualified to sit on a Bank of America appeal, because of stock ownership and loans. Despite this, it appears reasonable to assume that Justice Racanelli had some hand in the assignment to Division One, of three appeals involving the Bank of America, in all of which the Bank prevailed. Justices Racanelli and Elkington received appointments to the Superior Court and Court of Appeal, respectively, during the time that Mr. Winslow Christian was executive secretary to Governor Brown, Sr.. Mr. Christian was formerly a Justice of this Court, and thus a fellow Justice of Justice Elkington for 12 years, and Justice Racanelli for 7 years, and former Justice Christian has been the Director of Litigation for the Bank of America, handling these cases and appeals and Mr. Christian presumably selected Mr. Christopher and the O'Melveny firm, to act as appellate counsel for the briefing and argument, and Mr. Christopher has such political influence as to possibly be able to obtain appointments to the federal bench or positions in the federal government, for Justices Racanelli and Newsom, and possibly Justice Elkington, if Governor Dukakis is elected President. Lastly, Justices Racanelli and Newsom have failed to disqualify themselves or even to disclose their disqualification, to counsel on these appeals, and Justice Elkington though aware of the said disqualification of his fellow Justices, has failed to cause his colleagues to disclose their disqualification, or to act on his own initiative, to disclose their disqualification.

We submit that the average person on the street, knowing all of the foregoing facts, would entertain a reasonable doubt of the ability of Justices Racanelli, Elkington, and Newsom, to be completely impartial in the decision of these appeals, and that therefore, to avoid even the appearance of impropriety, as well as to comply with the Canons of Judicial Ethics governing disqualification, and to maintain the confidence of the public in the integrity and impartiality of the judiciary, all three Justices are disqualified, and must be considered disqualified.

## APPENDIX B

First District
Division One

State of California
Court of Appeal
State Building-Civic Center
San Francisco

John T. Racanelli
Presiding Justice

June 29, 1988

Chief Justice Malcolm M. Lucas
Associate Justices
Supreme Court, State of California
State Building, Civic Center
San Francisco, Ca 94102

Re: Kruse v. Bank of America, S006208

A Motion to Take Evidence has been filed by Petitioner Kruse in conjunction with her pending Petition for Review in the above captioned matter. Said motion is based in part on the declarations of petitioner's counsel and two other declarants relevant to a claim of disqualification based on my alleged ownership of stock in the Bank of America.

I submit the enclosed declaration and attached exhibits with reference to said motion for the court's consideration.

Respectfully,

John T. Racanelli

## DECLARATION OF JOHN T. RACANELLI

I, John T. Racanelli declare as follows:

1. I participated as a member of the panel of Division One of the First Appellate District that heard and decided the appeals in Kruse v. Bank of America. (A033064/A039161.)

2. The Petition for Review filed by Irene O'Connell Kruse on June 27, 1988 (S006208) contains allegations essentially similar to those presented to the Court of Appeal in her petition for rehearing that I was disqualified because of an asserted ownership of stock in the Bank of America.

3. In a companion Motion to Take Evidence, petitioner Kruse has submitted declarations from William M. Lukens, Calvin F. Gunn and Dolly Ares attesting that on April 29, 1986, I stated in open court before an argument that I owned stock in the Bank of America.

4. I do not now own, nor have I ever owned, any stock in the Bank of America in any amount whatever. To my knowledge, no other person or entity holds, or has ever held, any stock in the Bank of America in my behalf, either in my name or any other name or designation.

5. My annual Statements of Economic Interests, filed under oath with the Clerk of the Court, First Appellate District, accurately reflect that I do not own and have never owned any Bank of America stock.

6. I have never publicly stated or claimed, either in open court on April 29, 1986, or at any other time and place, that I owned stock in the Bank of America.

7. I presently own, and for some time have owned, a Visa credit card issued in the ordinary course of business by the Bank of America. Prior to the 1984 repeal and replacement of Code of Civil Procedure section 170, it was my usual practice, in proceedings involving the Bank of America as a party, to disclose the debtor-creditor relationship resulting from my periodic use of the Visa card. Though I have no independent recollection of

statements made in connection with oral argument on April 29, 1986, it is likely that—consistent with my past practice— I made a similar disclosure of ownership of a Bank of America Visa card.

8. I have attached the following certified copies of court records for the First Appellate District, Division One:

Certified copies of the minutes of April 29, 1986 and April 30, 1986 (Exhibits A and B, respectively) and certified copies of the computerized docket entries for Johnson v. Daon Corporation (A0279361 and Alexander v. Alexander (A023629) (Exhibits C and D, respectively). Those minutes and computerized docket entries reflect the following:

a) There was no oral argument in Johnson v. Daon Corporation (A027936), the matter for which Gunn attests he appeared and made an oral argument (Exhs. A, C);

b) No action was taken on April 29, 1986, in Alexander v. Alexander (A023629), the matter for which Ares attests she appeared. However, a written request for continuance was filed by Ares on April 30, 1986, and granted by the court that same day (Exhs. B, D).

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 29th day of June 1988 in San Francisco, California.

_____

John T. Racanelli

## EXHIBIT A

San Francisco, April 29, 1986
**Division One**

### COURTROOM PROCEEDINGS

The court met in its courtroom at the State Building, 350 McAllister Street, San Francisco, CA at 9:00 a.m. Present: Racanelli, P.J., Elkington, J., Newsom, J., P. Keeley, Deputy Clerk.

**A029660 — People v. Delgado.** Cause called and argued by James Kyle Gee for appellant and Gene Kaster for Respondent. Cause ordered submitted.

**A027188 — People v. Watkins.** Cause called and argued by Deborah Tuttleman for appellant and Ann K. Jensen for respondent. Cause ordered submitted.

**A026704 — Wright v. Toomajian.** Cause called and argued by Orville L. Wright for appellant and Geoffrey A. Mires for respondent. Cause ordered submitted.

**A025332 — Margaret Inda Smyklo v. Alexander Smyklo.** Cause called and argued by Alexander Smyklo, appellant in pro per and S. Simone Campbell for respondent. Cause ordered submitted.

**A026709 — Frank Barberis v. Bank of America.** Cause called and argued by William M. Lukens for appellant and Kristan D. Whitten for respondent. Cause ordered submitted.

At this time Holmdahl, J., joins the bench for the remainder of cases argued.

**A026551 — People v. Smith.** Cause called and argued by Paul Wolf for appellant and Mark S. Howell for respondent. Cause ordered submitted.

At this time Racanelli, P.J., leaves the bench for the remainder of the cases argued.

**A030691 — People v. Carpenter, Jr.** Cause called and argued by Catalina Lozano for appellant and Jeff Bryant for respondent. Cause ordered submitted.

**A026959 — Sierra Mortgage v. Bi'Anny Corp., Stephen Lopes et al.** Cause called and argued by Wade H. Hover for appellant Stephen Lopes. Leo M. Cook, attorney for respondent, did not appear. Cause ordered submitted.

Court adjourned in tribute to the late Justice Murray Draper.

Oral argument having been waived, the following cases are deemed submitted:

**A023402 — Rodrigues et al. v. Lewis et al.**
**A028446 — People v. Slater.**
**A028289 — Bouzos et al. v. City of Berkeley et al.**
**A027936 — Johnson et al. v. Daon Corp. et al.**
**A030075 — Buckenmeyer v. Parmelee et al.**

Court recessed until Wednesday, April 30, 1986 at 9:00 a.m.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 70-71.

## EXHIBIT B

San Francisco, April 30, 1986

**Division One**

**A023629 — Mabel G. Alexander v. Richard E. Alexander.** The request for continuance of oral argument is granted. The cause heretofore scheduled for hearing on Tuesday, April 29, 1986 at 9:00 a.m. is taken off calendar and rescheduled for hearing on Tuesday, May 27, 1986 at 9:00 a.m. Racanelli, P.J.

**A027435/A033676 — George S. Krusi v. Bear, Stearns & Co.** The request that same panel hear related appeals is denied.

The request to augment the record is treated as a request to take judicial notice and as such, is granted. Judicial notice will be taken of the transcript of the hearing held March 7, 1984. Elkington, Acting, P.J.

**A032599 — Thomas E. Flowers etc. v. San Francisco Residential Rent Stabilization & Arbitration Board; Golden Gateway Center et al., Real Parties in Interest.**

**A032602 — John L. Farr, etc. v. San Francisco Residential Rent Stabilization and Arbitration Board; Stonestown Properties, Inc. et al.** The stipulated motion for consolidation of the above-entitled appeals is granted for purposes of briefing, oral argument and decision in Division One. Racanelli, P.J.

**A034789 — In re Helmut August Hanken.** The petition for writ of habeas corpus and continuance of bail pending determination of the proceeding is denied. Racanelli, P.J.

**A034794 — Joseph Wilfred Boulet v. Superior Court, Alameda County; People, First Appellate District.** The petition for writ of prohibition is denied. Racanelli, P.J.

Minutes of the First Appellate District, microfilm roll 59; printed in Advance Sheet No. 15 (June 3, 1986), pp. 74-75.

## EXHIBIT C

## COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

**DIVISION: 1**

Case No. A027936

**TITLE**

JOHNSEN, ALBERT C., Et Al.

vs.

DAON CORPORATION, Et Al.

**SUPERIOR COURT INFORMATION**

County: Santa Clara
Superior Court No.: 483580
Superior Court Judge: H. B. Thompson
Notice of Appeal Date: July 5, 1984

**ATTORNEYS—LITIGANTS**

GUNN, CALVIN F.
2345 Yale St.
P.o. Box 60369
Palo Alto, CA 94306

JOHNSEN, ALBERT C., Et Al. — *Plaintiff-Appellant*

DEYHIMY, GUITY
Mills Bldg., Suite 924
220 Montgomery St.
San Francisco, CA 94104

JOHNSEN, ALBERT C. — *Plaintiff-Appellant*

CARROLL, DAVID
PO Box 5080
Costa Mesa, CA 92626

DAON CORPORATION, ETC. — *Defendant-Respondent*

## DOCKET ENTRIES

July 11, 1984
Supreme Court Order Filed Transferring Case.

July 11, 1984
Notice of Appeal Lodged/Received.
Fee Paid Attys Gunn and Deyhimy

December 18, 1984
Record On Appeal Filed.
R 3
Under 5.1 Ruling

January 2, 1985
Note:
Kelly of Atty Ruben'S Office Called Re: Not Receiving the Record Due To Incorrect Address of

January 2, 1985
Note:
P.o. Box 5030 When the Correct Address is P.o. Box 5080

January 18, 1985
Filed Letter From:
Richard Ruben Dated 1-2-85 Re His Correct Address.
Atty Screen Has Been Corrected.

January 24, 1985
Apellant'S Appendix and Opening Brief Filed.
2 Volumes of Appendix

March 1, 1985
Respondents Brief Filed.

March 15, 1985
Motion Filed.
To Augment Record From Atty David Carroll of Drummy, Garrett King & Harrison For Resp. daon Corp.

March 15, 1985
Previous Entry Continued.
Tct 4-1-85

April 1, 1985
To Court.
Motion To Augment Record. To Martha (From Resp. Daon Corp.)

April 15, 1985
Case Fully Briefed.
No Arb Received.

May 14, 1985
Order Filed.
Mot. to Augment Record Granted. Record Deemed Aug. To Include A Tx of Proceed. held 8-9-82 and Exh. n

May 14, 1985
Previous Entry Continued.
To Plfs. and Appell. first Amended Complaint Attachd To Motion To Aug. (Jt)

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N,E,H) Pak

April 9, 1986
Request for Oral Argument Filed By:
Atty Carroll For Rspdt Daon Corp. only If Applts Req. oral Argument. (Pak)

April 29, 1986
Argument Waived, Cause Submitted.
Pak

June 26, 1986
Opinion Filed.
Judgment of Trial Ct Dismissing the 1st, 2nd, 3rd And 7th Causes of Applt's Second Amended Complaint

June 26, 1986
Previous Entry Continued.
Is Reversed. The Case Is Remanded To the Trial Ct For Proceedings Consistent With the Views

June 26, 1986
Previous Entry Continued.
Expressed Herein. (See Dissenting Opinion)
Np (Pak)

August 26, 1986
Remittitur Issued.
Jt

## CASE DISPOSITION INFORMATION

Disposition Date: June 26, 1986
Disposition: Reversed & Remanded To Trial Court W/Directions.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Elkington Apj (C) Holmdahl (D)

## JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

Judge Name: Holmdahl, John (J)
Role: Participa

END OF DOCKET CARD INFORMATION

## EXHIBIT D

## COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

**DIVISION: 1**

Case No. A02369

**TITLE**

ALEXANDER, MABEL G.
vs.
ALEXANDER, RICHARD E.

**SUPERIOR COURT INFORMATION**

County: San Francisco
Superior Court No.: 723984
Superior Court Judge: I. H. Grant
Notice of Appeal Date: July 28, 1983

**ATTORNEYS—LITIGANTS**

ARES, DOLLY
110 N. Third St.
San Jose, CA 95112

ALEXANDER, RICHARD E. *Defendant-Appellant*

DE HART, GLORIA, Deputy
6000 State Building
San Francisco, CA 94102

ALEXANDER, MABEL G. *Plaintiff-Respondent*

## DOCKET ENTRIES

August 2, 1983
Notice of Appeal Lodged/Received.
Fee Paid Atty Ares

August 31, 1984
Record On Appeal Filed.
C 1 R 1

September 28, 1984
Stipulation of Extension of Time Filed To: †††
Aob To November 1, 1984 Granted.

November 1, 1984
Stipulation of Extension of Time Filed To: †††
Aob To December 1, 1984 Granted.

November 30, 1984
Appellant'S Opening Brief Filed.

January 2, 1985
Stipulation of Extension of Time Filed To: †††
Rb To March 1, 1985 Granted.

March 7, 1985
Respondent Notified Pursuant To Rule 17(B).

April 2, 1985
Respondents Brief Filed.

April 25, 1985
Appellant'S Reply Brief Filed.

April 25, 1985
Case Fully Briefed.

March 28, 1986
Calendar Notice Sent. Calendar Date:
Tuesday, April 29, 1986 At 9:00 a.m. (N, R, E)
Pak

April 3, 1986
Request For Oral Argument Filed By:
Atty Ares For Applt Richard Alexander. (Pak)

April 30, 1986
Filed Letter From:
Req. continuance of Oral Argument From Dolly Ares Office, Atty For Applt. (Pak)

April 30, 1986
Order Filed.
Cont. of Oral Argument Granted. Cont. To Tuesday, May 27, 1986 At 9:00 a.m. (Pak)

May 27, 1986
Cause Argued and Submitted.
Jt

August 20, 1986
Opinion Filed.
The Judgment Is Reversed. Costs Are Awarded To Appellant. Np (Pak)

September 30, 1986
Petition For Review In Supreme Court Received.
A.g. Gloria De Hart.
Jt

September 30, 1986
Petition For Review Filed In Supreme Court.
Pak

November 12, 1986
Petition For Review Denied In Supreme Court.
Respondent. (N, R, E) (Pak)

November 12, 1986
Remittitur Issued.
Pak

## CASE DISPOSITION INFORMATION

Disposition Date: August 20, 1986
Disposition: Reversed In Full.
Opinion Type: Sign Npub
Disposition Final: (Y = Yes — Blank = No) Y
Notation: Newsom J (A) Racanelli Pj (C) Elkington J (C)

## JUDGES PANEL INFORMATION

Judge Name: Newsom, William A. (J)
Role: Authoring

Judge Name: Racanelli, John T. (Pj)
Role: Participa
Voted: Concur

Judge Name: Elkington, Norman (J)
Role: Participa
Voted: Concur

## APPENDIX C

## AFFIDAVIT OF DAVID B. FLINN

I, DAVID B. FLINN, under penalty of perjury, declare as follows:

Petitioner IRENE O'CONNELL KRUSE commences her "Statement of the Case" of the Petition for Writ of Certiorari with the statement that the undersigned and his law firm "have long acted as the attorneys on behalf of the family corporation of Justice William A. Newsom, who participated on the panel of three Justices who reversed Petitioner's judgment." That statement is completely untrue. Neither I, nor the law firm of Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, has ever represented Justice Newsom.

In May of 1982 Justice Newsom, in an arm's length negotiated transfer, sold all of his shares of Squaw Valley Improvement Corporation to two sisters and a brother. Prior to the sale, the corporation was represented by Lawrence Silver of the law firm of Feldman, Waldman & Kline of San Francisco. Throughout the entire sale transaction Justice Newsom was represented by Edwin Shiver of San Francisco.

In June of 1982, after the sale, the corporation, then controlled by Justice Newsom's sisters and brother, employed the undersigned and his law firm, Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, to dissolve the corporation and distribute the assets amongst the three shareholders, and *only then* (after Justice Newsom's withdrawal), did the undersigned and his law firm commence representation of the corporation. (The corporation was liquidated and dissolved.)

The form entitled "Statement by Domestic Stock Corporation" attached as Exhibit G to the Petition is a standard California form which is mailed annually by the California Secretary of State to each corporation. The portion at the top which reads "Squaw Valley Improvement Corporation, William A. Newsom, Jr., 350 McAllister Street, San Francisco, CA 94102" is a prestamped address placed upon the form by the Secretary of State from the prior year's filing. Thus, the inclusion of Justice Newsom upon the form is solely as ad-

dressee of the form, since the Secretary of State records from 1981 showed his office as the "corporate office." The new shareholders changed the place of business of the corporation to the office of my law firm, and only the new shareholders acted as officers and directors. Justice Newsom had no further involvement with the corporation and thus neither I, nor my firm, represented the corporation at a time that Justice Newsom was a shareholder.

Dated: December 19, 1988.

DAVID B. FLINN

David B. Flinn

Sworn to and subscribed before me this 19th day of December, 1988.

HELEN D. CARLSON

Notary Public

## APPENDIX D

1st Civil Nos.
**A0 33064, A0 39161**

**IN THE**

# Supreme Court of the State of California

IRENE O'CONNELL KRUSE,

*Plaintiff and Respondent,*

GEORGE R. JEWELL
and CHARLES DUCK,
Trustee of the Bankruptcy Estate
of GEORGE M. JEWELL
and LAURA E. JEWELL,

*Cross-Complainants and Respondents,*

v.

BANK OF AMERICA, N.T. & S.A.

*Defendant, Cross-Defendant and Appellant.*

(Sonoma County
Court No. 112439)

## PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE

A. BARRY CAPPELLO
THOMAS G. FOLEY, JR.
FRANCES E. KOMOROSKE
LEILA J. NOEL
CAPPELLO & FOLEY
831 State Street,
Santa Barbara, CA 93101
Telephone (805) 564-2444

Attorneys for Cross-Complainants and Respondents GEORGE R. JEWELL and CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL

## TOPICAL INDEX


| | | PAGE[1] |
|---|---|---|
| TABLE OF AUTHORITIES | | |
| I. | INTRODUCTION | 29 |
| II. | ISSUE PRESENTED FOR REVIEW | 30 |
| III. | STATEMENT OF THE CASE | 30 |
| | A. Procedural History | 30 |
| | B. Statement of Facts | 33 |
| IV. | THE OPINION WAS WRONGLY DECIDED BY TWO JUSTICES WHOSE DIRECT FINANCIAL TIES TO THE APPELLANT BANK OF AMERICA MANDATED THEY BE DISQUALIFIED | 39 |
| | A. Presiding Justice Racanelli Owned Stock in the Bank of America During the Pendency of this Appeal and Failed to Disclose It | 39 |
| | B. Justice Newsom Negotiated and Obtained a Substantial New Loan from the Bank of America While this Appeal Was Pending | 43 |
| | C. The Bias of the Court is Evident From the Opinion's Intentional and Systematic Rejection of Established Principles of Appellate Review | 44 |
| | 1. The Opinion Refused to Consider the Existence of the Fiduciary Relationship Between the Jewells and the Bank | 45 |
| | 2. The Opinion Ignored the Substantial Evidence of the Long-Term Loan Commitment and the Bank's Breaches | 46 |
| | 3. The Opinion Ignored Substantial Evidence and Legal Authority Which Demonstrated the Jewells' Reliance Was Justifiable | 48 |
| | 4. The Opinion Refused to Consider the Law or the Facts Which Demonstrated the Bank's Acts Were the Proximate Cause of the Jewells' Injuries | 49 |
| | 5. The Allegedly Internally Inconsistent Verdicts Can Be, And Should Have Been, Reconciled by the Court of Appeal | 50 |


[1] Page references have been revised to conform to the pagination of this Appendix.

## TABLE OF AUTHORITIES


| CASES | PAGE |
|---|---|
| *Adams v. Minor* (1898) 121 Cal. 372 | 40 |
| *Adoption of Alexander S.* (1988) 44 Cal.3d 857 [245 Cal.Rptr.1] | 47 |
| *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813 [106 S.Ct. 1580; 89 L.Ed.2d 823] | 8,9,10,42 |
| *Allen v. Sundean* (1982) 137 Cal.App.3d 216 [186 Cal.Rptr. 863] | 50 |
| *Barbara A. v. John G.* (1983) 145 Cal.App.3d 369 [193 Cal.Rptr. 422] | 46 |
| *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362 [229 Cal.Rptr. 16] | 45,50 |
| *Bixler v. First National Bank of Oregon* (Ore.App. 1980) 619 P.2d 895 | 47 |
| *Brewer v. Simpson* (1960) 53 Cal.2d 567 [2 Cal.Rptr. 609] | 50 |
| *Coastland Corp. v. Third National Mortgage Co.* (4th Cir. 1979) 611 F.2d 969 | 47 |
| *Crystal Springs Trout Co. v. First State Bank of Froid* (Mont. 1987) 732 P.2d 819 | 47,50 |
| *Estate of Sanders* (1985) 40 Cal.3d 607 [221 Cal.Rptr. 432] | 45,48 |
| *First National Bank in Lenox v. Brown* (Iowa 1970) 181 N.W.2d 178 | 45 |
| *Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412 [159 P.2d 958] | 48 |
| *Isthmian Lines, Inc. v. Schirmer Stevedoring, Co.* (1967) 255 Cal.App.2d 607 [63 Cal.Rptr. 458] | 46 |
| *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 [184 Cal.Rptr. 302] | 5,11,42 |
| *Khanna v. Microdata Corporation* (1985) 170 Cal.App.3d 250 [215 Cal.Rptr. 860] | 46 |

| CASES | PAGE |
|---|---|
| *K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n* (Ariz.App. 1983) 677 P.2d 1317 | 47 |
| *Landes Construction Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365 | 47 |
| *Liljeberg v. Health Services Acquisition Corp.* (June 17, 1988) ____ U.S. ____ [88 Daily Journal D.A.R. 7756 | 10,41 |
| *Lindsay-Strathmore Irrigation District v. Superior Court* (1920) 182 Cal. 315 [187 P. 1056] | 43 |
| *Moody v. Shuffleton* (1928) 203 Cal.100 [262 P. 1095] | 40 |
| *In Re Murchison* (1955) 349 U.S. 133 [75 S.Ct. 623; 99 L.Ed. 942] | 41,42 |
| *National Farmers' Organization v. Kingsley Bank* (10th Cir. 1984) 731 F.2d 1464 | 47 |
| *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451 [72 S.Ct. 813; 96 L.Ed. 1068] | 42 |
| *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892 [215 Cal.Rptr. 679] | 4,5,47 |
| *Seeger v. Odell* (1941) 18 Cal.2d 409 [115 P.2d 977] | 48 |
| *Skeels v. Universal C.I.T. Credit Corporation* (3d Cir. 1964) 335 F.2d 846 | 48 |
| *Solberg v. Superior Court* (1977) 19 Cal.3d 182 [137 Cal.Rptr. 460] | 39 |
| *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40 [58 Cal.Rptr. 238] | 43 |
| *Wait v. First Midwest Bank/ Danville* (Ill.App. 1986) 491 N.E.2d 795 | 47 |
| *Ward v. Village of Monroeville Ohio* (1972) 409 U.S. 57 [93 S.Ct. 80; 34 L.Ed.2d 267] | 42 |

| CASES | PAGE |
|---|---|
| **STATUTES** | |
| 28 U.S.C. §455(a) | 41,42 |
| California Code of Judicial Conduct Canon 3 | 40,41,42 |
| California Code of Judicial Conduct Canon 5 | 44 |
| California Code of Judicial Conduct Preamble | 43 |
| California Rule of Court 29(a)(3) | 39 |
| California Rule of Court 976(b) | 33 |
| Government Code section 68081 | 47 |
| Government Code section 82034 | 40 |
| **MISCELLANEOUS** | |
| ABA Code of Judicial Conduct Canon 3 | 41 |
| *Corbin on Contracts* (1963) | 46 |
| Prosser & Keaton, *The Law of Torts* (15th ed. 1984) | 50 |

**TO THE HONORABLE CHIEF JUSTICE OF CALIFORNIA AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:**

George R. Jewell and Charles Duck, trustee of the bankruptcy estate of George M. Jewell and Laura E. Jewell, cross-complainants and respondents (the "Jewells"), respectfully petition for review following the decision of the Court of Appeal, First District, Division One (per Racanelli, P.J.), filed on May 18, 1988 and modified June 17, 1988.

## I

## INTRODUCTION

The farm credit crisis of the 1980's, brought about in part by questionable practices of agricultural lenders, resulted in the foreclosure of thousands of acres of agricultural land throughout the country. The reaction by Midwestern farmers included murders of bankers and suicides, while California farmers reacted in a more civilized way by resorting to the courts. This case represents the first of those decisions favorable to farmers which has worked its way through the California judicial system.

That journey was abruptly blocked by an appellate court, two of whose justices have direct, undisclosed financial ties to the appellant Bank of America, California's largest agricultural lender. Those ties include the ownership by one justice of Bank of America stock during the pendency of this appeal, a fact admitted by him in open court and corroborated by independent attorneys. It also includes a substantial loan from the Bank of America to another justice which was obtained during the pendency of this appeal, a fact substantiated by the justice's Form 721 Statement of Economic Interests.

The two justices, in disregard of their duty to disqualify themselves to avoid having their impartiality questioned, refused respondents' requests to recuse themselves. In the face of these obvious conflicts, the court instead issued two published opinions which reversed a multi-million dollar jury verdict against the Bank of America in a decision being described by

the commentators as "extraordinary", "highly unusual", and "very surprising". The appearance, if not the fact, is unmistakable: These justices were not impartial. That appearance was later confirmed by the comments of the justices and their staff to the press.

The court's total disregard of traditional standards of appellate review was proof in and of itself of its lack of impartiality. By selectively disregarding evidence, judging witnesses' credibility, crediting the Bank's version of the facts over those supporting the judgments, and otherwise performing the functions of the jury, the appellate court stepped far beyond the bounds of propriety in stretching to reach a decision extremely favorable to a party to whom it had financial ties. This decision provided an immediate benefit to the Bank of America in relieving it of a multi-million dollar judgment; more importantly, it discourages future challenges to the Bank's improper practices.

Conduct such as the appellate court's destroys the public's perception of the independence and integrity of the judiciary, and raises serious questions over its ethics. This Court is therefore respectfully petitioned to grant review to uphold the traditionally high ethical standards of the California courts.

## II

## ISSUE PRESENTED FOR REVIEW

This case presents one issue for review: Should a decision in a landmark lender liability case be allowed to stand when the decision was wrongly decided by two justices who should have disqualified themselves?

## III

## STATEMENT OF THE CASE

### A. Procedural History.

The Jewells filed these actions against the Bank in 1981; a three-month jury trial began on April 22, 1985. During trial it was discovered the Bank had wilfully suppressed evidence

damaging to its case; that evidence was ordered disclosed. (V.37:3476-87.[1]) After eight days of deliberations, verdicts were rendered on July 19, 1985. (R.A. 152-53.)

The jury awarded the bankruptcy estate of George and Betty Jewell $12.75 million in compensatory damages and $19 million in punitive damages. (R.A. 154.) George R. was awarded $4.5 million in compensatory damages and $1 million in punitive damages. (R.A. 155.) Special interrogatories indicated the jury found in favor of the Jewells for actual fraud, constructive fraud, and bad faith breach based on the denial of the existence of a contract.[2] (R.A. 150-51.)

The Bank moved for judgment notwithstanding the verdict and new trial; the trial court denied the former, but conditionally granted the latter if the Jewells did not consent to a $15 million reduction in the punitive damage awards. (R.A. 343-47.) The Jewells consented to the remittitur, the Bank appealed, and the Jewells cross-appealed. (R.A. 348-50, 351-59, 360-67.)

On May 18, 1988, the Court of Appeal filed its initial opinion, certified for publication, which overturned the Jewells' judgments. That opinion ignored virtually all rules of appellate review and was seemingly motivated by a desire to reach a decision favorable to the Bank. The linchpin to the Jewells' case, their fiduciary relationship with the Bank, was totally disregarded, as was the substantial evidence supporting the jury's findings that the Bank had committed three separate torts in ten distinct instances over a four-year period. In response to these and many other factual and legal errors, the Jewells filed a petition for rehearing on June 2, 1988.

On June 11, 1988, the Jewells for the first time learned from counsel for respondent Mrs. Kruse that Presiding Justice Racanelli had stated on April 29, 1986 at oral argument of an

---

[1] Excerpts from the reporter's transcript are cited by volume and page number; "R.A." is respondent's appendix.

[2] The basis for these findings was a series of acts by the Bank over a four-year period which constituted actual and constructive fraud in 1976; actual and constructive fraud in 1977; actual fraud, constructive fraud, and bad faith breach of contract in 1978-79; and actual fraud, constructive fraud, and bad faith breach of contract in 1980.

unrelated Bank of America case that he owned stock in the Bank of America. (Ex. A. at p.2.) It was also then learned that Justice Newsom had paid off or otherwise discharged loans to the Bank of America and then negotiated for and obtained a new custom line of credit from the Bank in excess of $10,000 in 1987 while this appeal was pending. (*Id.* at pp. 8, 11, 14, 17.) An investigation was begun, and a request made that the two justices disqualify themselves and grant rehearing if Mr. Lukens' allegations were true.

The response of the justices, their staff attorneys, and the Bank to these serious charges of impropriety was highly troubling. In the media, Justice Racanelli enigmatically stated to *The Recorder* in an article published June 15, 1988 that he had "no reportable stocks or bonds" in the Bank of America, implying he owned *some* interest. (Ex. B.) Justice Newsom declined all comment. (*Ibid.*)

The court's attorneys *did* comment; one stated that Justice Racanelli "has never owned Bank of America stock," and claimed that "Mr. Lukens misunderstood what was said or misrecollected" the events of April, 1986. (*Ibid.*) However, two independent attorneys present at the April, 1986 oral argument have corroborated Mr. Lukens' statement that the two justices did in fact admit to their financial ties to the Bank of America. (Exs. C and D.)

The principal court attorney for the First District was quoted in *The Recorder* article as stating that Justice Racanelli did not learn that this appeal was assigned to his panel until February, 1987, and that:

> "If he owned stock, he obviously would have disqualified himself. Judges recuse themselves for the slightest of reasons. Even the appearance of impropriety. I am sure there was none of that here." (Ex. B.)

That is not true; as the docket sheet from Division One, District One indicates, this case was before this panel on October 24, 1985. (Ex. E.) One December 4, 1985, this panel sent Mr. Lukens a notice regarding his filing fee (Ex. F), and on July 22, 1986, Justice Racanelli himself granted the Bank of America an extension to file its opening brief. (Ex. G.)

The day after *The Recorder* article, the requests for disqualification were denied along with the petitions for rehearing. A new, modified opinion with over 100 changes was issued; it was also certified for publication despite the fact that it, like the prior opinion, failed to meet the requirements of California Rule of Court 976(b). (App. A.)

## B. Statement of Facts

The Jewells jointly owned and operated a highly successful business in Sebastopol which grew, brokered, transported, and packed apples.[3] (R.A. 419, 891; V.25:4202.) The Jewells had been customers of the Bank of America since the late 1930s, and they developed a close friendship with Bill Sullivan, the local branch manager. (V.9:1911, V.10:2250-34, V.24:4166, 4200-lb.)

The Jewells were unsophisticated in financial matters and relied extensively on Sullivan for advice and guidance in that area. (V.10:2250-88, V.24:4200-lb, 4200-2, 4200-5.) The Jewells believed Sullivan to *be* the Bank of America, and whatever he told them, they "banked on." (V.11:2335, V.24:4200-4, 4200-5, V.25:4211, 4216.)

The Bank first exploited this fiduciary relationship in 1976 when it induced the Jewells to borrow $150,000 from the Bank to save the James E. O'Connell Company ("O'Connell") from an impending foreclosure sale which would have exhausted the Bank's security for its loans to O'Connell. (R.A. 556, 565; V.16:3154-56, V.25:4217-18, 4225.) Sullivan failed to disclose to the Jewells the severe financial problems O'Connell was facing and the fact the Bank would not loan any more money to it. (R.A. 542; V.11:2283, 2290-92, V.15:2987-88, V.25:4218.) This intentional concealment was documented by an internal memo by Sullivan. (R.A. 824.)

---

[3] These facts are necessarily severely abridged because of space limitations; a more detailed rendition is located in the Jewells' Respondents' Brief filed April 3, 1987.

Months later O'Connell faced another financial crisis and the Jewells loaned it another $114,000 which they borrowed from the Bank, still operating under the assumption that Sullivan would advise them if they should not do so. (R.A. 504-13; V.25:4237-39, V.26:4440-41.) The two loans caused a severe strain to the Jewells' working capital, a fact reflected in internal Bank documents which questioned the Jewells' ability to repay the Bank. (R.A. 548-55, 557, 565; V.11:2315-19, 2323, V.25:4232-34.)

Despite this knowledge, Sullivan's superiors at the Bank decided to induce the Jewells to borrow from the Bank to pay off O'Connell's delinquent loans to the Bank, a fact documented in its internal memos. (R.A. 565, 573.) When George questioned why the Bank wanted him to pay off O'Connell's delinquent loans, Sullivan said his superiors at Regional Credit Administration ("Regional") had asked that George do this, but that if any problems arose because of it, the Bank would work with the Jewells to solve them. (V.12:2541; V.25:4235-37.)

The promised assistance included a long-term loan to consolidate the Jewells' short-term debt; the Jewells promised not to encumber their ranch so it would be available as security for that loan. (V.10:2069-70, V.11:2376, V.12:2426, V.13:2641-44, V.25:4236-37, 4277-79, V.26:4346.) The Jewells believed that by doing as their friend Sullivan asked, Sullivan was committing to help them; based on this belief, the Jewells borrowed $150,000 *from* the Bank and gave it *to* the Bank to pay off O'Connell's delinquent loans. (R.A. 577, 578; V.11:2372-76; V.25:4236-37.)

The Jewells' financial condition quickly degenerated as a result of their "favor" to Sullivan, a fact reflected in the Bank's documents. (R.A. 573, 658, 891.) The burden imposed by their large loans to O'Connell prevented them from paying back from their own operations the funds they had borrowed from the Bank for O'Connell. (V.11:2350-51; V.25:4235-37; V.33:5805-07, 5812-13.) This set in motion a spiral of debt which forced the Jewells to borrow more funds from the Bank for O'Connell in the futile hope O'Connell could thereby recover and repay the Jewells. (V.12:2446, V.25:4242-43, 4250, V.26:4454.)

When it became necessary to construct a new dehydrator for the O'Connell plant, Sullivan agreed to make a $1 million long-term loan to be secured by the new plant. (R.A. 659; V.25:4250-52, V.26:4346.) This agreement was evidenced by Betty's notes from a meeting with Sullivan, which were found in his files. (R.A. 659; V.25:4250-52, V.37:6581-82.) As a result of discussions with Sullivan at this meeting, the Jewells believed the Bank would make a long-term loan on the O'Connell plant or, if necessary, the Bank would make a long-term loan directly to the Jewells secured by their ranch. (V.12:2508-10, V:25:4250-52, 4277-79, V.26:4346.)

Sullivan later informed George that the Bank would not fund the O'Connell project if Dan O'Connell managed it. (V.25:4248-49, 4253-54; V.26:4370-71.) George refused to remove Dan O'Connell from his own family's business and instead went to the Bank's main competitor, the Production Credit Association ("PCA"), for financing. (V.25:4254.) Sullivan soon lured the Jewells back with statements that Regional regretted its refusal to loan them the funds. (V.25:4258, V.26:4391.)

Regional was actually motivated by its concern that the PCA might get a security interest in the Jewell's ranch, but to the Jewells, Sullivan's statements meant the Bank would fund the O'Connell plant. (R.A. 599; V.10:2069-70, V.12:2474-75, V.25:4259.) The Bank made a $209,000 equipment loan to the Jewells for that plant; in exchange it asked the Jewells for deeds of trust on their property. (R.A. 606-17; V.12:2480-81, V.25:4259.) The Jewells resisted encumbering their own property for O'Connell since they "did not owe the industry that much." (V.25:4259-60.)

The fact that the Bank made an equipment loan on a project indicated to the Bank's assistant manager that the Bank would make a long-term loan on that project. (R.A. 606-17; V.20:3600-09, 3600-10.) A Bank vice-president also testified it would be unusual for the Bank to make an equipment loan for a project without providing a long-term loan. (V.23:3977-78.) In addition, it was standard Bank practice to loan funds for major construction projects only after permanent financing had been arranged. (V.21:3641, 3701, V.23:3959-60, 4047,

V.30:5141.) The Bank knew that the funds it was advancing the Jewells were being used for O'Connell; this also implied the long-term loan was forthcoming. (R.A. 644-46, 655-56, 712-30, V.23:4049-50/1b, V.34:5864-66, 5878-79.)

Sullivan's practice of advancing construction funds on the basis of oral assurances that long-term loans would eventually be approved was repeated by him on at least two other projects: The $17.7 million Sebastopol Cooperative Cannery ("Co-op") and the $900,000 "Fresh Pack" plant which George R. built for packing and storing high quality apples. (R.A. 461, 862-71; V.7:1423, V.9:1990, V.13:2741, V.19:3303-07, V.32:5553, V.25:4265.) This was an unorthodox way of financing major construction projects, yet Sullivan routinely followed it and even advanced sums which exceeded his lending limit. (R.A. 634-43, 647, 862-71; V.13:2754-56, V.14:2777, 2782-86, V.20:3600/9-10, V.22:3858.) The Co-op and Fresh Pack plants eventually got the long-term loans promised by Sullivan. (V.9:1964-65, V.32:5553.)

As the O'Connell project advanced, various representatives of the Bank repeatedly visited the site and offered nothing but encouragement to the Jewells. (R.A. 454; V.32:5526-27.) Sullivan's support was unflagging, and his superior Norm Jensen also expressed his enthusiasm to the Jewells. (V.9:1985-88, V.12:2526-28, V.23:4051/14, V.25:4248, 4263, .4265, 4281-83, V.26:4455-56, 4500/7, V.32:5519, 5525-27, V.36:6418-19.) No one from the Bank ever said or did anything which discouraged the Jewells from going forward with the project or which indicated that the long-term loan might not be approved. (V.4263, 4265-66). As a result, the Jewells believed that "further up in the Bank everything was in accord." (V.25:4282-83, V.26:4500/7.)

This belief was not unreasonable; the Bank's own policy manual prohibited "entering into detailed discussions or negotiations with customers regarding complex, controversial, or unusual transactions" without prior approval by Regional. (R.A. 887.) The manual also directed the Bank's employees to "[e]xercise care in such discussions to ensure that the customer does not interpret the discussions as a commitment." (*Ibid.*)

Internal Bank documents evidenced the Bank's intent to make the loan, as well as the fact the Jewells were relying on the loan to help them repay the debt they were incurring on the O'Connell project. (R.A. 437, 454, 631, 644, 645, 648-49, 813; V.9:1987-88, V.10:2250/27, V.12:2511-12, 2527). Other documents indicate Regional knew Sullivan was advancing large sums to the Jewells for the O'Connell project and that these could only have been repaid with a long-term loan. (R.A. 404-05, 589-91, 606-17, 631, 632-33, V.9:1797, V.23:3989.)

Despite this knowledge, the long-term loan was denied on the pretense the O'Connell plant was "special purpose" and the Bank loaned funds only for multi-purpose buildings. (R.A. 424; V.22:3773, 13878-79.) The plant was in fact multi-purpose; in addition, the Jewells' Fresh Pack plant, which *did* obtain a long-term loan, *was* a special-purpose building. (R.A. 424, 663; V.9:1791, V.22:3878-79.)

Sullivan argued these points to Regional in an impassioned memo, criticizing the Bank for disregarding its own policies and for failing to tell him it would not approve the O'Connell loan. (R.A. 438-40, 652-54; V.13:2656-57.) Unable to change Regional's mind, Sullivan abruptly and permanently left the Bank. (R.A. 677-78; V.13:2615-16, 2656-57, 2660.)

Sullivan was replaced as branch manager by Roger "Rocky" Bunch, whose self-proclaimed mission from his first day in Sebastopol was to get deeds of trust on the Jewells' ranch. (V.17:3171/90-92, 3171/95-96, 3171/99, V.30:5255, V.45:8056-57.) From that day on, Bunch resorted to every conceivable means to entice, persuade, humiliate, or frighten the Jewells into turning the deeds over to him. (V.26:4330, V.30:5193-94, V.30:5248-50, V.37:6589-90.) Bunch's "job and duty to the Bank [was] to try to get deeds of trust from any source I can if I possibly can" since "anything that George controlled, it would be [my] job to try to get that for the bank." (V.18:3300/10.)

On October 30, 1979, an application for a $1.9 million long-term loan for the O'Connell plant was submitted which specified all the terms and conditions of the long-term loan Sullivan had been promising the Jewells; these included a 20-year term, 12 percent interest, and the O'Connell plant as

security. (R.A. 669-75.) The application also noted that the Jewells had borrowed $1.3 million from the Bank to construct the plant in reliance on the fact the Bank would finance it. (R.A. 673.) No one from the Bank would take responsibility for the application. (V.17:3171/55-56, V.20:3600/19, V.31:5395-98.)

Bunch's mission to get the Jewells' deeds of trust became an obsession; virtually every time the Jewells met with Bunch, he asked for them. (R.A. 695; V.17:3171/101, 3171/95-96, 3171/106-107.) The Jewells refused, since Bunch never agreed to the long-term loan which Sullivan had promised and on which the Jewells had substantially relied. (V.17:3171/97, V.25:4294, V.26:4336.) The Jewells were, however, fully prepared to give the Bank the deeds of trust if it honored its promise to give them the long-term loan on their own ranch which they desperately needed, but the Bank did not. (V.17:3171/136, V.25:4294-95, V.26:4470.)

Bunch's determination paid off; in the summer of 1980, he announced to the Jewells the Bank would loan them no more money, but offered to assist them with a plan to liquidate their assets under the Bank's supervision. (V.25:4299, V.30:5248-50.) The proceeds were to go to the Bank, which would first pay the 100 apple growers who had sold apples to the Jewells and who were at that point the Jewells' greatest concern, then the PCA, and, lastly, itself. (V.30:5191, 5198-99, 5248.) The Jewells reluctantly agreed to the plan, after months of threats, humiliation, and intimidation, which culminated in George's emotional collapse at a joint Bank-PCA meeting. (V.26:4326-27, V.29:4970, V.30:5193-94, V.32:5561, V.37:6589:90.)

In reliance on Bunch's assurances of assistance, the Jewells turned over everything they owned to the Bank. V.26:4328, 4336, V.30:5242, 5250-51, 5264-66, V.32:5562, V.37:6591.) The Bank kept virtually all the proceeds of the sales of the Jewells' properties, as well as their deeds of trust. (V.26:4332, V.29:5016, V.30:5262-63, V.31:5339.)

After three years of litigation, thousands of dollars of attorneys' fees, and an order from the Bankruptcy Court, the Bank was forced to return the proceeds and deeds of trust to the Jewells. (V.29:5014, V.31:5370, V.37:6524-25.) It was undis-

puted the Jewells would never have given their deeds of trust if they had known the Bank would not honor its commitment to pay their growers and the PCA, a fact the Bank conceded. (V.26:4334, 4338; V.30:5264-65, V.37:6591-92.)

As soon as the PCA learned the Bank had "double-crossed" it by taking the Jewells' deeds of trust, the PCA moved against the Jewells. (R.A. 457, 803, 805; V.29:5001-5005, 5019-5020, V.34:5997-98.) George told Dan O'Connell, and the O'Connells filed a lawsuit to prevent the Bank from forcing the Jewells to foreclose on the O'Connell property. (V.24:4099; V.26:4338; V.29:5050-52.) George and Betty then filed a voluntary bankruptcy petition, their son followed them several months later and the 100 apple growers are still waiting, eight years later, to be paid. (R.A. 805; V.30:5123, V.31:5475/19, V.32:5573.)

## IV

## THE OPINION WAS WRONGLY DECIDED BY TWO JUSTICES WHOSE DIRECT FINANCIAL TIES TO THE APPELLANT BANK OF AMERICA MANDATED THEY BE DISQUALIFIED

### A. Presiding Justice Racanelli Owned Stock in the Bank of America During the Pendency of this Appeal and Failed to Disclose It.

California Rule of Court 29(a)(3) mandates review of a decision of an appellate court "where, because of disqualification or other reason, the decision of the court of appeal lacks the concurrence of the required majority of qualified justices." At least one and perhaps two of the three justices who issued the opinion should have disqualified themselves from hearing this appeal. As a result, their decision is necessarily void, and review should be ordered. (*Solberg v. Superior Court* (1977) 19 Cal.3d 182, 190.)

What evidence there is on Justice Racanelli's stock ownership in the Bank of America would lead a reasonable person to conclude he should have disqualified himself from hearing

this case. At the same time this appeal was pending before District One, Division One, Justice Racanelli owned, by his admission in 1986, *some* stock in the Bank of America.

Whether Justice Racanelli still owns stock in the Bank has not been answered satisfactorily; he merely stated on June 15, 1988 he had no *reportable* interest. (Ex. B.) According to Government Code section 82034, an interest which is less than $1,000 need not be reported. Despite this, California Code of Judicial Conduct Canon 3 requires disqualification if a judge has *any* financial interest in a party. As a result, Justice Racanelli should have disqualified himself, even if his interest did not have to be reported on his Form 721.

It is no defense that Justice Racanelli has since disposed of his Bank of America stock, if that is in fact what occurred. Almost 100 years ago, this Court decided another case in which a judge owned stock in a bank which was a party to a lawsuit, yet believed he was not disqualified because he had disposed of the stock. (*Adams v. Minor* (1898) 121 Cal. 372.) This Court responded:

> We do not think that the belief of the judge one way or the other would change the fact of his disqualification. He might honestly believe and hold that he was qualified, but that would not qualify him any more than he could acquire jurisdiction by deciding that he had it. Nor do we think that removing the cause of disqualification after the case was submitted to him for decision would operate to remove the qualification. The code says if he is interested no "justice, judge, etc. . . . shall sit or act as such." This does not mean that he may hear the evidence in a case in which he is interested and may decide it, after sitting and acting in it, provided he remove the cause of disqualification before he enters judgment. As we all know, the decision of questions arising during the course of the trial often determines the final judgment itself. The statute must be held to mean what it says, and it is that he shall not sit or act as judge in an action in which he is interested. (*Id.* at 375; accord. *Moody v. Shuffleton* (1928) 203 Cal. 100, 103-05.)

Disqualification rules are strictly interpreted; they mandate disqualification of judges *who do not even know of the facts which create the appearance of impropriety.* Less than two weeks ago, the U.S. Supreme Court decided the landmark decision of *Liljeberg v. Health Services Acquisition Corp.* (June 17, 1988) ____ U.S. ____ 88 Daily Journal D.A.R. 7756, in which it vacated a final order by a District Court judge because of the judge's *possible* conflict of interest, even though the judge was *unaware* of the conflict.

The Supreme Court based its decision on 28 U.S.C. § 455(a)[4]; it, like California Code of Judicial Conduct Canon 3, is based on ABA Code of Judicial Conduct Canon 3. The statute's violation is established when "a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge" of the facts which create the appearance of partiality; in that situation the judge's "impartiality might reasonably be questioned." (*Liljeberg, supra* at 7759.)

The Supreme Court noted that the purpose of section 455(a) is to "promote public confidence in the integrity of the judicial process"; it is therefore irrelevant "whether or not the judge actually knew of facts creating an appearance of impropriety, so long as the public might reasonably believe that he or she knew." While the risk of injustice to the parties should be considered, much more significant is "the risk of undermining the public confidence in the judicial process." (*Id.* at 7760.) The Court cautioned that it "must continuously [be borne] in mind that to perform its highest function in the best way 'justice must satisfy the appearance of justice.'" (*Ibid.*, quoting *In Re Murchison* (1955) 349 U.S. 133, 136, 75 S.Ct. 623, 625.)

In weighing whether the drastic sanction of vacating a final order on which the parties have relied should be imposed, the Supreme Court found that doing so would prevent "a substantive injustice in some future case by encouraging a judge or litigant to more carefully examine possible grounds for disqualification and to promptly disclose them when discovered." (*Id.* at 7761.) The Court concluded that in all cases, the

[4] It provides: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

"guiding consideration is that the administration of justice should reasonably appear to be disinterested as well as be so in fact." (*Ibid.*, quoting *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 466-67, 72 S.Ct. 813, 823; accord, *Aetna Life Insurance Co. v. Lavoie* (1986) 475 U.S. 813, 823, 106 S.Ct. 1580, 1580.)

California Code of Judicial Conduct Canon 3, like 28 U.S.C. §455(a), requires judges to disqualify themselves in any proceeding in which "their impartiality might reasonably be questioned." Despite this clear mandate and in complete disregard of the public's perception of their action, Justices Racanelli and Newsom refused to disqualify themselves, apparently in reliance on *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-40. (App. A.)

Neither *Kaufman* nor any other California case, statute, rule, or canon authorizes that action. *Kaufman* held that California follows the Federal rule in allowing a challenged justice to decide whether he sould disqualify himself, but that decision is obviously reviewable by this Court. It is also reviewable by the U.S. Supreme Court since the issue has Constitutional dimensions. (*Aetna Life Insurance Co. v. Lavoie, supra* at 825, 1587, quoting *in Re Murchison* (1955) *supra* at 136, 625; see also, *Ward v. Village of Monroeville Ohio,* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 83).

Whatever interests Justices Racanelli and Newsom had in the Bank of America should have been disclosed to allow the parties and their counsel the choice of proceeding with that panel. This Court demands no less of itself; those justices who are shareholders in the Bank of America routinely disqualify themselves from considering cases involving the Bank of America. (Ex. H).

The same is true of the Federal courts; U.S. District Court Judge William A. Ingram, who unknowingly and indirectly owned $80 worth of stock of Intel, but later disposed of it, recently disqualified himself from deciding the landmark computer copyright case of *NEC Corp. v. Intel Corp.* (Ex. I.) However, Judge Ingram did so only after he had earlier refused to disqualify himself, which prompte a request by NEC to the

Ninth Circuit Court of Appeal to intervene; at that point Judge Ingram disqualified himself and vacated all his rulings in the case.

Certainly the public deserves no less from Division One, District One, and especially from its Presiding Justice, the former chair and a current member of the Commission on Judicial Performance. The preservation of the integrity and independence of the judiciary demands adherence to the highest ideals of both personal and official conduct. (Preamble, California Code of Judicial Conduct.) Public perceptions of justice are hardly furthered when justices who are reasonably thought to be biased by virtue of financial ties to a party decide in a case, particularly Case as far-reaching and significant as this. (*Lindsay-Strathmore Irrigation District v. Superior Court* (1920) 182 Cal. 315, 334; *Tatum v. Southern Pacific Co.* (1967) 250 Cal.App.2d 40, 42.)

**B. Justice Newsom Negotiated and Obtained a Substantial New Loan from the Bank of America While this Appeal Was Pending.**

It appears from Justice Newsom's Form 721 that he had a car loan from the Bank of America during 1985 and two other small unsecured loans from the Bank in 1986 and 1987 which were each paid off in those years. (Ex. A at pp. 8, 11, 14.) Justice Newsom apparently thereafter negotiated and obtained, sometime between January and December, 1987, a substantial, new, unsecured "Customline credit" loan from the Bank in an amount in excess of $10,000. (*Id.* at p. 17.) Justice Newsom held this loan as of February 29, 1988; he heard oral argument in this case on February 25, 1988. (*Id.* at p. 16.)

The Bank claims that its loan to Justice Newsom is "virtually indistinguishable from a credit card charge account". (Bank's Opposition to Petition for Disqualification, p. 9, fn. 2.) It is submitted that it could appear to a reasonable person highly unusual for a person with an income of that of an associate appellate court justice to have a credit card from the Bank of America with a limit in excess of $10,000. Whether such a credit arrangement is in fact "a loan from a lending

institution in its regular course of business on the same terms generally available to persons who are not judges", as authorized by Canon 5C (4)(b), is a matter which cannot be determined by virtue of Justice Newsom's refusal to comment.

However, even if the loan were technically permitted by Canon 5C (4)(b), its propriety must still be weighed against the admonition in the Commentary to Canon 5C which states that judges should "refrain from engaging in business and from financial activities that might interfere with the impartial performance of their judicial duties." It must also be weighed against the paramount concerns of Canon 3C, which requires judges to disqualify themselves *in any proceeding in which their impartiality might reasonably be questioned.* It is submitted that a reasonable person would find it highly unseemly that a judge who had the power to decide a major case which substantially affected the financial interests of a lender was negotiating with that lender to obtain a large, unsecured loan while the case was pending before him.

In any event, if Justice Newsom felt his old loans were significant enough to disclose it at the April, 1986 oral argument of a minor Bank of America case, then certainly it would have been more important to disclose his new, increased loan in this landmark decision. His failure to even mention it in this proceeding raises serious doubts about his impartiality and leaves the public with the distinct impression that perhaps justice is not blind.

### C. The Bias of the Court is Evident From The Opinion's Intentional Rejection of Established Principles of Appellate Review.

The decision in this case was, to say the least, shocking. Lenders' counsel and the commentators were as surprised as the parties and their counsel that an appellate court would reverse jury verdicts and a new trial order on the basis on an alleged lack of substantial evidence. William Burke, bank counsel and authority in lender liability, described the decision as "highly unusual." (Ex. J.) Professor Schecter of Loyola Law School, another authority in the field, described it as "very surprising" since "the appellate court is in essence saying that

no reasonable jury could have come to the conclusion that this jury came to. This is extraordinary."[5] (*Ibid.*)

Reversals based on a lack of substantial evidence are rare; this is so because of the well-established rules which presume the judgment to be correct, prevent reviewing courts from weighing evidence and re-examining questions of fact, and require that the evidence and the inferences based thereon be viewed in the light most favorable to the prevailing party. All of these rules were completely disregarded, along with both substantial evidence and legal authority which supported the verdicts. No rational explanation exists for this result, other than a lack of impartiality by the court which rendered the decision.

### 1. The Opinion Refused to Consider the Existence of the Fiduciary Relationship Between the Jewells and the Bank.

The Opinion cavalierly dismissed what was probably the most central issue in the case: The Bank's exploitation of its admitted fiduciary relationship with the Jewells.[6] (App. A at 17.) Had it not done so, it would have been compelled to find in favor of the Jewells for three reasons.

First, there is no question that the Bank had a duty to disclose facts to the Jewells which it failed to disclose and that it took undue advantage of the Jewells by using them "as tools with which to alleviate the results of its own prior poor loan judgment" by paying off O'Connell's delinquent loans. (*First National Bank in Lenox v. Brown* (Iowa 1970) 181 N.W.2d 178, 184.) That shifted the burden of proof to the Bank to prove its good faith and lack of undue influence, a burden the Bank never met; it also constituted constructive fraud. (*Estate of Sanders* (1985) 40 Cal.3d 607, 616.)

---

[5] Almost as surprising was the modified opinion which omitted some issues which had been raised *sua sponte* by the court, changed substantially the court's interpretation of the facts, and substituted new legal authority for old. Despite these concessions that the original opinion was both factually and legally erroneous, the ultimate decision to reverse remained unchanged.

[6] The opinion ignored both the facts and the law on fiduciary relationships, including cases such as *Barrett v. Bank of America* (1986) 183 Cal.App.3d 1362, in which the Bank of America was found liable for acts strikingly similar to those of this case.

Second, the existence of the fiduciary relationship required the Jewells' reliance to be measured by a different standard than that used in the opinion. (*Barbara A. v. John G.* (1983) 145 Cal.App.3d 369, 382.) As discussed *infra*, the Jewells met the correct standard.

Third, since the judgment was based on the three separate torts of actual fraud, constructive fraud, and bad faith breach, it had to be affirmed if any *one* of the three was supported by substantial evidence and unaffected by error. (*Khanna v. Microdata Corporation* (1985) 170 Cal.App.3d 250, 258.) The constructive fraud claim was fully supported both legally and factually; thus, the judgments should have been affirmed.

### 2. The Opinion Ignored the Substantial Evidence of the Long-Term Loan Commitment and The Bank's Breaches.

The opinion claims the parties never got beyond the negotiating stage, and that therefore no contract ever arose. (App. at 28-31.) While this issue was never raised at trial and there was necessarily no evidence on it, what *was* proven at trial clearly disproves it.

First, it is only when the evidence *clearly shows* an agreement is subject to further negotiations that it will not be enforced on the basis the parties were merely negotiating. (*Corbin on Contracts* (1963) §95, pp. 397, 401-02.) There was no such evidence.

Second, the fact that one party to the agreement begins performance with the knowledge of the other proves the contract was consummated. (*Id.* at 407.) Here, the Jewells did everything the Bank asked of them and substantially relied on the fact the Bank would perform.[7]

---

[7] For this reason, the Jewells have consistently argued that it will be an idle act to reverse the judgments since the Jewells can prevail at retrial on the alternative theories of implied contract and estoppel. (*Isthmian Lines, Inc. v. Schirmer Stevedoring, Co.* (1967) 255 Cal.App.2d 607, 610.) The modified opinion concedes this point. (App. A at former fn. 14, p.29.)

The opinion also claims there was a lack of substantial evidence of the loan commitment, yet that evidence was overwhelming.[8] Many recent decisions have upheld oral loan commitments on evidence much less substantial than this.[9] There was thus no basis in the law or the facts for the opinion to conclude no commitment was made.

Similarly, there was absolutely no basis for the opinion to find no breach by the Bank of that commitment. The opinion's basis for this finding was the Jewells' alleged refusal to pledge their ranch as security for a long-term loan. However, the evidence was undisputed that the Jewells were fully prepared to do so as soon as the Bank gave them the long-promised, long-term loan, yet the Bank never did so.

Finally, the opinion includes the incredible statement that the Bank's conduct in refusing to return the sales proceeds from the Jewells' property, along with their deeds of trust, was not a breach.[10] (App. A at 31-33.) It is beyond comprehension how a court could state in a published opinion that when a party

---

[8] For example, the visits by Sullivan's superiors, the Bank documents discussing the commitment, the loan application itself, the parties' course of dealing, the evidence relating to similar funding of the Co-op and the Jewells' Fresh Pack plants, Betty Jewell's notes from the December, 1978 meeting, and the Bank's practice of not advancing funds for construction projects in the absence of a long-term commitment all supported the Jewells' statements that a commitment had been made.

[9] See, *Landes Construction Co., Inc. v. Royal Bank of Canada* (9th Cir. 1987) 833 F.2d 1365; *National Farmers' Organization v. Kingsley Bank* (10th Cir. 1984) 731 F.2d 1464; *Coastland Corp. v. Third National Mortgage Co.* (4th Cir. 1979) 611 F.2d 969; *Crystal Springs Trout Co. v. First State Bank of Froid* (Mont. 1987) 732 P.2d 819; *Wait v. First Midwest Bank/Danville* (Ill.App. 1986) 491 N.E.2d 795; *K-Line Builders, Inc. v. First Federal Savings & Loan Ass'n* (Ariz.App. 1983) 677 P.2d 1317; *Bixler v. First National Bank of Oregon* (Ore.App. 1980) 619 P.2d 895.

[10] In stretching to reach this conclusion, the opinion had to consider, and resolve, highly technical bankruptcy issues which had never come up at trial and on which there was no evidence. (App. A at 32-33.); by doing so, the opinion erred both legally and factually, and violated Government Code §68081. (See, *Adoption of Alexander* (1988) 44 Cal.3d 857, 864-65.) The opinion had to also disregard such highly damning evidence as Bunch's boasts that there "was never any doubt in our mind" that the Bank would have to return the property it had in effect stolen from the Jewells. Similar conduct by the Bank has earned this Court's censure in cases such as *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 908-09, another case in which Division One, District One again sided with the Bank of America.

makes a promise, fails to perform, denies it ever had a duty to perform, fights in court for years to prove it had no duty to perform when it knew full well it did, loses that fight, and then, when mandated by court order, belatedly and begrudgingly performs, *that* is not a "breach" of the original promise. It is submitted that only bias could produce such a result.

### 3. The Opinion Ignored the Substantial Evidence and Legal Authority Which Demonstrated the Jewells' Reliance Was Justifiable.

Reliance in a fiduciary relationship is measured by special standards; facts that would ordinarily require investigation may not excite suspicion, and the same degree of diligence is not required. (*Hobart v. Hobart Estate Co.* (1945) 26 Cal.2d 412, 440; *Estate of Sanders, supra*, at 619.) The opinion ignored this in concluding the Jewells' reliance was not justifiable because they allegedly knew the promised loan was beyond Sullivan's lending limit. (App. A at 21.)

The Jewells proved their reliance was justifiable given their fiduciary relationship with the Bank, their intelligence, and information. (*Seeger v. Odell* (1941) 18 Cal. 2d 409, 415.) The Jewells dealt exclusively with Sullivan, and felt it was inappropriate to confer with Sullivan's superiors. (V.25:4282.) In addition, the Jewells got nothing but positive support from Sullivan, who had in the past regularly provided the funds he promised, even if they exceeded his lending limits. Sullivan's superiors also expressed their support to the Jewells; this signified Regional approval to the Jewells. This type of belief was precisely what the Bank's policy manual warned against.

Given the Bank's decision to place Sullivan in the role of vice president and branch manager, his assurances to the Jewells were the equivalent of "factual representations of an apparently knowledgeable agent for his principal". *Skeels v. Universal C.I.T. Credit Corporation* (3rd Cir. 1964) 335 F. 2d 846, 851.) In such a situation, it was entirely reasonable for the Jewells to rely on them.

**4. The Opinion Refused to Consider the Law or the Facts Which Demonstrated the Bank's Acts Were the Proximate Cause of the Jewells' Injuries.**

The opinion is wrong in stating there was no substantial evidence the Jewells' injuries were proximately caused by their involvement in O'Connell, that the Jewells' ultimate destruction was inevitable, and that the law on proximate cause is contrary to the Jewells' position. First, there was overwhelming evidence that but for Sullivan's initial inducement of the Jewells in becoming involved with O'Connell and later staying involved, the Jewells would not have suffered the damages they did. This evidence ranged from Sullivan's own admission he had "participated" in the Jewells' "difficult situation" (V.12:2509-10), to an internal Bank document which noted in November, 1980 that the Jewells' problems began with their 1976 involvement with O'Connell (R.A. 891). Simple common sense also provides support; had the Jewells not gotten involved in O'Connell, O'Connell would have collapsed and there would have been no subsequent drain on the Jewells' finances.[11]

Second, there was nothing at trial which proved that the Jewells' destruction was inevitable. The opinion seized on a number of factors which allegedly contributed to the Jewells' demise, yet all but one of them directly resulted from the Jewells' involvement in O'Connell and would not have occurred but for it. (App. A at 19.) The one remaining factor, the bankruptcy of one of the Jewells' debtors, was a very minor cause of their problems and could have easily been absorbed if the Jewells had not had the burden of O'Connell. (V.26:4500-8.)

Third, the opinion is wrong in stating that if other factors also contributed to the Jewells' economic problems, then the Bank was relieved of liability. (App. A at 19.) The law is clear that if several factors contribute to the occurrence of an event, a

---

[11] Other evidence included the testimony of Jewells' expert witnesses that after the Jewells paid off the delinquent O'Connell loans in 1977, they could not pay back the Bank from their own operations because of their involvement with O'Connell, and were left with insufficient operating funds as a result of that involvement. (V.11:2350-51, V.25:4235-37, V.33:5805-06, 5812-13.) In addition, the Bank's own documents reflect its concern over the Jewells' finances as a result of their involvement in O'Connell. (R.A. 557, 658, 660, 648, 887, 888, 896.)

defendant is not absolved if his conduct was a *substantial* factor, or if the other factors were within the scope of the original risk to which the defendant subjected the plaintiff. (Prosser & Keaton, *The Law of Torts* (15th ed. 1984) §41, pp. 266, 268; §44, p. 303.) Since the later risks the Jewells' encountered were within the scope of the original risk to which the Bank subjected them, then necessarily the Bank is liable. (See, *Crystal Springs Trout Co. v. First State Bank, supra,* at 824.)

Fourth, the opinion's legal and factual analysis of the Jewells' eventual destruction is inaccurate. It is not true that a defendant is not liable if the plaintiffs' damages were "inevitable or due to unrelated causes", and the authority the opinion cites does not so hold. In addition, since the issue never came up at trial, there was minimal evidence on it; what little there was directly contradicts the opinion's statement.[12]

### 5. The Allegedly Internally Inconsistent Verdicts Can Be, And Should Have Been, Reconciled by the Court of Appeal.

It is the duty of appellate courts to reconcile superficially inconsistent findings. (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 583; *Allen v. Sundean* (1982) 137 Cal.App.3d 216, 224.) This can easily be done in the instant case, yet the court simply flung up its hands in mock despair over its alleged inability to do so.

The jury could have found both that Sullivan, as the bank's agent, intended to the make the long-term loan, but that his superiors did not. That would still result in liability to the Bank since "a principal may be liable when he intentionally misinforms or withholds information from the agent and the agent thereupon innocently misrepresents." (*Barrett v. Bank of America, supra* at 1369-70.) Had not the court been searching for opportunities to reverse the judgment, it could have performed this simple task of reconciling the verdicts.

---

[12] By taking the Jewells' deeds of trust, the Bank started a domino effect which caused the Jewells' creditors to scramble for assets; bankruptcies and lawsuits were then filed to prevent foreclosures. But for that original act of the Bank, the Jewells would not have been forced into bankruptcy.

## V

## CONCLUSION

For the reasons stated, this petition for review should be granted and this cause set for argument.

DATED: June 27, 1988

Respectfully submitted,

CAPPELLO & FOLEY

By: A. BARRY CAPPELLO

A. BARRY CAPPELLO
Attorneys for Respondents Charles Duck, Trustee of Bankruptcy Estate of George M. and Laura E. Jewell, and George R. Jewell

## VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____ and know its contents.

☒ CHECK APPLICABLE PARAGRAPH

☐ I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am ☐ an Officer ☐ a partner _____ ☐ a _____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. ☐ I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. ☐ The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

☐ I am one of the attorneys for _____

_____

a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19____, at _____ California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

**ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENT**
**(other than summons and complaint)**

Received copy of document described as _____

_____

on _____ 19____

_____ _____

Type or Print Name Signature

## PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SANTA BARBARA

I am employed in the county of SANTA BARBARA, State of California. I am over the age of 18 and not a party to the within action; my business address is: 831 State Street, Santa Barbara, CA 93101.

On June 27, 1988, I served the foregoing document described as PETITION FOR REVIEW OF DECISION OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE on_____

_____

in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

see attached list

☒ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Santa Barbara, California.

Executed on June 27, 1988, at Santa Barbara, California.

☐ (BY PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

Executed on _____, 19____, at _____, California.

☒ (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

☐ (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

PATRICIA LYNCH

Type or Print Name

_____

Signature

Proof of Service List for *Jewell v. Bank of America*

David B. Flinn
Steven B. Mains
Jeffrey Lowenthal
LELAND, PARACHINI, STEINBERG, FLINN, MATZGER & MELNICK
333 Market Street, 27th Floor
San Francisco, California 94105

William Lukens
LUKENS, PERRY DRUMMOND & COOPER
One Maritime Plaza
San Francisco, California 94111

Frederick N. Watson
Attorney at Law
1111 Civic Drive, Suite 300
Walnut Creek, California 94596

Warren Christopher
Karen Growdon
O'MELVENY & MYERS
400 South Hope Street
Los Angeles, California 90071-2899

Honorable Laurence K. Sawyer
Superior Court of Sonoma County
600 Administration Drive
Hall of Justice
Santa Rosa, California 95401

Court of Appeal
4154 State Building
350 McAllister Street
San Francisco, CA 94102

Supreme Court, U.S.
FILED
JAN 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-918

# In the Supreme Court of the United States

**October Term, 1988**

CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL,

*Petitioners,*

*v.*

BANK OF AMERICA, N.T. & S.A.,

*Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION ONE

## PETITIONERS' REPLY BRIEF

A. BARRY CAPPELLO
FRANCES E. KOMOROSKE
CAPPELLO & FOLEY
Attorneys at Law
831 State Street
Santa Barbara, California 93101
Telephone: (805) 564-2444

*Attorneys for Petitioners*
*CHARLES DUCK, Trustee of the Bankruptcy*
*Estate of GEORGE M. JEWELL and LAURA E. JEWELL,*
*and GEORGE R. JEWELL*

Westside Law Pubishers Los Angeles, California (213) 477-0491

## TOPICAL INDEX


| | | Page |
|---|---|---|
| I. | Preliminary Statement | 1 |
| II. | The Decision Below is Reviewable Now | 2 |
| III. | The Due Process Claims Were Raised in the State Court Proceedings | 4 |
| IV. | The California Supreme Court Expressly Ruled in *Kaufman* that Federal Law on Disqualification of Appellate Court Justices is Followed in California | 7 |
| V. | Conclusion | 8 |

## TABLE OF AUTHORITIES

**PAGE**

**CASES**

*Aetna Life Ins. Co. v. Lavoie*
(1986) 475 U.S. 813 . . . . . 4

*Berger v. United States*
(1921) 255 U.S. 22 . . . . . 8

*Board of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537 . . . . . .6

*Cardinale v. Louisiana*
(1969) 394 U.S. 437 . . . . . 6

*Cohen v. Beneficial Indus. Loan Corp.*
(1949) 337 U.S. 541 . . . . . 3

*Cox Broadcasting Corp. v. Cohn*
(1975) 420 U.S. 469 . . . . . 3, 4

*Department of Banking, State of Nebraska v. Pink*
(1942) 317 U.S. 264 . . . . . 2

*Dyke v. Taylor Implement Mfg. Co.*
(1968) 391 U.S. 216 . . . . . 6

*Eddings v. Oklahoma*
(1982) 455 U.S. 104 . . . . . 5

*F.G. Oxley Stave Co. v. Butler County, Mo.*
(1897) 166 U.S. 648 . . . . . 6

*Gospel Army v. City of Los Angeles*
(1947) 331 U.S. 543 . . . . . 2

## TABLE OF AUTHORITIES

**PAGE**

**CASES (Cont.)**

*Health Services Acquisition Corp. v. Liljeberg*
(5th Cir. 1986) 796 F.2d 796 . . . . . .2

*Herndon v. State of Georgia*
(1935) 295 U.S. 441 . . . . . 6

*In Re Murchison*
(1945) 349 U.S. 133 . . . . . 1, 4

*Kaufman v. Court of Appeal*
(1982) 31 Cal.3d 933 . . . . . 7

*Liljeberg v. Health Services Acquisition Corp.*
(1988) __ U.S. __ [108 S.Ct. 2194] . . . . . 1, 2

*People of State of New York ex rel. Bryant v. Zimmermann* (1928) 278 U.S. 63 . . . . . .5

*Public Utilities Commission v. Pollak*
(1952) 343 U.S. 451 . . . . . 2

*Radio Station WOW, Inc. v. Johnson*
(1945) 326 U.S. 120 . . . . . 3

*United States v. Gigax*
(10th Cir. 1979) 605 F.2d 507 . . . . . .8

*United States v. Sibla*
(9th Cir. 1980) 624 F.2d 864 . . . . . 8

*Ward v. Village of Monroeville, Ohio*
(1972) 409 U.S. 57 . . . . . 4

## TABLE OF CONTENTS

PAGE

**CASES (Cont.)**

*Webb v. Webb*
(1981) 451 U.S. 493 . . . . . .4, 5, 7

*Webb's Fabulous Pharmacies, Inc. v. Beckwith*
(1980) 449 U.S. 155 . . . . . 6, 7

**STATUTES**

28 U.S.C. section 1257 . . . . . 2

California Code of Civil Procedure section 170 . . . . . 7

**MISCELLANEOUS**

R. Stern, E. Gressman & S. Shapiro,
*Supreme Court Practice* (6th ed. 1986) . . . . . .3

*No. 88-918*

**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1988

**CHARLES DUCK, Trustee of the Bankruptcy Estate of GEORGE M. JEWELL and LAURA E. JEWELL, and GEORGE R. JEWELL**

*Petitioners,*

v.

**BANK OF AMERICA, N.T. & S.A.,**

*Respondent.*

---

**PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FIRST APPELLATE DISTRICT, DIVISION ONE**

---

# PETITIONERS' REPLY BRIEF

## I

## PRELIMINARY STATEMENT

Conspicuous by its absence in the Bank's Opposition is any discussion whatsoever of whether the decision below comported with the fundamental requirement that " 'justice must satisfy the appearance of justice.' " (*Liljeberg v. Health Services Acquisition Corp.* (1988) __ U.S. __ [108 S.Ct. 2194, 2204], quoting *In Re Murchison* (1945) 349 U.S. 133, 136.) Also absent from the Bank's brief is any discussion of

whether " 'a reasonable person, knowing all the circumstances,' " would question the partiality of the two challenged justices. (*Liljeberg*, 108 S.Ct. at 2202, quoting *Health Services Acquisition Corp. v. Liljeberg* (5th Cir. 1986) 796 F.2d 796, 802.)

Instead, the Bank focuses on whether the two justices met the technical requirements of a "disqualifying financial interest" under California state law. That is not the relevant inquiry; rather, the issue raised in this petition is whether the decision below was in conformance with the " 'guiding consideration ... that the administration of justice should reasonably appear to be disinterested as well as be so in fact.' " (*Liljeberg*, 108 S.Ct. at 2207, quoting *Public Utilities Commission v. Pollak* (1952) 343 U.S. 451, 466-67.) The Jewells submit the decision was neither, and that therefore review should be granted.

## II

## THE DECISION BELOW IS REVIEWABLE NOW

The Bank misinterprets the requirement that a state court judgment must be final before it can be reviewed by this Court. It is clear that:

> "Today 'the test is not whether under local rules of practice the judgment is denominated final ... but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that *that adjudication is not subject to further review by a state court* ...' " (*Gospel Army v. City of Los Angeles* (1947) 331 U.S. 543, 547, quoting *Department of Banking, State of Nebraska v. Pink* (1942) 317 U.S. 264, 268, emphasis added.)

Thus, 28 U.S.C. section 1257 requires only that there be a final judgment or decree by the highest state court *as to the federal question which is being raised in the petition for writ of certiorari*. (R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) § 3.7, p. 120.) Here, there may be additional judgments and decrees in state court as a result of the remand order, yet there will be no further decision by any state court *on the due process question* raised in this petition.

However, even if that were not true, review should nevertheless be granted. This Court has repeatedly recognized that the requirement of finality "is to be given a 'practical rather than a technical construction.'" (*Cox Broadcasting Corp. v. Cohn* (1975) 420 U.S. 469, 478, fn. 7, quoting *Cohen v. Beneficial Indus. Loan Corp.* (1949) 337 U.S. 541, 546.) As a result, many situations have been recognized in which state court decisions on federal questions have been considered final despite the fact further proceedings were contemplated. (*Cox Broadcasting*, 420 U.S. at 478; see also, R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) § 3.10, pp. 130-133.)

These situations have two factors in common, both of which are present here. First, the additional proceedings do not require the decision of other federal questions that might also warrant review by this Court at a later date. Second, immediate review will avoid " 'the mischief of economic waste and of delayed justice,' " as well as unnecessary interference with state litigation. (*Cox Broadcasting*, 420 U.S. at 478, quoting *Radio Station WOW, Inc. v. Johnson* (1945) 326 U.S. 120, 124.)

The retrial of this action in state court will not require resolution of either the federal question raised in this peti-

tion or any other federal question. In addition, immediate review will promote judicial economy and speedy justice without unduly interfering with state court proceedings. Finally, if the state court decision were to stand, that would "seriously erode [the] federal policy" that justice should satisfy the appearance of justice. (*Cox Broadcasting*, 420 U.S. at 483.) Immediate review is therefore appropriate.

## III

## THE DUE PROCESS CLAIMS WERE RAISED IN THE STATE COURT PROCEEDINGS

The Bank claims that the Jewells never raised their due process claim in the state court proceedings. That is false.

As the Jewells stated in their Petition for Review to the California Supreme Court (Appendix D to Bank's Opposing Brief, p. 47), the issue of whether a challenged judge can decide if he should disqualify himself is one:

> "...reviewable by the U.S. Supreme Court since the issue has Constitutional dimensions. (*Aetna Life Ins. Co. v. Lavoie, supra*, at 825, 1587, quoting *In Re Murchison* (1955) *supra, at 136; see also, Ward v. Village of Monroeville, Ohio* (1972) 409 U.S. 57, 60, 93 S.Ct. 80, 83.)"

The requirement that the federal question be raised in the state court below is liberally construed. As this Court noted in *Webb v. Webb* (1981) 451 U.S. 493, 501:

> "Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on

which they rely, we have not insisted on such inflexible specificity."

Thus, for a petitioner to be able to raise the federal claim before this Court, there must be:

> "...no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." (*Webb*, 451 U.S. at 501, emphasis in original.)

Similarly, it is not necessary to raise the federal question in any specific manner since this Court's "jurisdiction does not depend on citation to book and verse." (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 113, fn. 9.) As noted over sixty years ago:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented." (*People of State of New York ex rel. Bryant v. Zimmermann* (1928) 278 U.S. 63, 67.)

In addition, the policy considerations underlying the requirement have all been satisfied in this case. Those considerations are that: (1) There be an adequate record on the federal question raised in state court; (2) the state court have the first opportunity to uphold state statutes in light of federal constitutional challenges; and (3) the state court

have the opportunity to block the federal question on an adequate and independent state ground. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 439.)

There is no question here that the California Supreme Court passed on the federal question raised by the Jewells, or that there is an adequate record to support this. As noted in that court's order denying review:

> "The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a *deprivation of due process of law*." (App. C, emphasis added.)

Since the Jewells had raised no *state* constitutional issues and the three cases on which they relied in their petition for review were all *federal due process* cases dealing with judicial disqualification,* then obviously the California Supreme Court considered the proper constitutional provisions when it denied the Jewells the relief they sought. (*Dyke v. Taylor Implement Mfg. Co.* (1968) 391 U.S. 216, 218,

* The Bank relies on *Herndon v. State of Georgia* (1935) 295 U.S. 441 and *Board of Directors of Rotary Intern. v. Rotary Club of Duarte* (1987) 481 U.S. 537 for the proposition that the Jewells' citation of U.S. Supreme Court cases does not satisfy the jurisdictional requirement, yet neither case so holds. Similarly, neither *F.G. Oxley Stave Co. v. Butler County, Mo.* (1897) 166 U.S. 648 nor *Webb's Fabulous Pharmacies, Inc. v. Beckwith* (1980) 449 U.S. 155 supports the Bank's contention that the Jewells' reference to their due process claims is legally inadequate.

fn. 3; *Webb v. Webb*, 451 U.S. at 495; see also, *Webb's Fabulous Pharmacies, 449 U.S. at 160, fn. 5.)*

## IV

## THE CALIFORNIA SUPREME COURT EXPRESSLY RULED IN *KAUFMAN* THAT FEDERAL LAW ON DISQUALIFICATION OF APPELLATE COURT JUSTICES IS FOLLOWED IN CALIFORNIA

The Bank states unequivocally that the California Supreme Court case of *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933 "neither interprets nor applies federal law" on judicial disqualification, and therefore review should not be granted on that basis. (Bank's Opposition, p. 11.) That is false.

In *Kaufman*, the California Supreme Court reviewed which members of the judiciary could decide whether a challenged justice should be disqualified, and noted those alternatives would be available if and only if that court were:

> "... to hold that the federal rule allowing each appellate judge to decide for himself should not be followed in California. We conclude instead (1) that, as to procedure, Code of Civil Procedure section 170 is not applicable, and (2) that *the federal rule*, which we are persuaded was – in effect – the accepted California rule until 1979, *should be reaffirmed*." (*Kaufman v. Court of Appeal*, 31 Cal.3d at 940, emphasis added.)

It is therefore apparent that the California Supreme Court does in fact apply federal law on disqualification on appellate court justices, as the Jewells argued in their petition. It is equally obvious that the application of that law to this case was erroneous since federal law holds that when a

justice is challenged for bias or prejudice, he can decide only the question of the legal sufficiency of the affidavits setting out bias or prejudice; if the affidavits are sufficient, the justice must disqualify himself. (*Berger v. United States* (1921) 255 U.S. 22, 33; accord, *United States v. Sibla* (9th Cir. 1980) 624 F.2d 864, 868; *United States v. Gigax* (10th Cir. 1979) 605 F.2d 507, 511.) That error constitutes but one more reason for granting review of this case.

## V

## CONCLUSION

Contrary to the Bank's arguments, the decision below was not based on established state law principles. Rather, the lower court ignored the fundamental principles that appellate courts must not determine questions of fact, weigh the evidence, ignore substantial evidence in favor of a judgment, or resolve doubts in favor of the non-prevailing party. Even neutral observers who commented on this highly-publicized case were surprised by the appellate court's total disregard of these basic state law principles. That in combination with the highly troubling facts learned about the appellate court's financial ties to the Bank of America would lead a reasonable person to believe that perhaps the appellate court was not impartial in reaching a decision highly favorable to the Bank of America.

While the decision below resulted in a gross miscarriage of justice to the Jewells, a much more serious ramification is its effect on the mind of the public about the integrity of the judiciary. This Court is therefore respectfully requested to grant review to remove any doubts that may have been cast in the public's mind about the judicial process, and to insure

that both the fact and the appearance of justice are preserved.

Respectfully submitted,
A. Barry Cappello
Frances E. Komoroske
CAPPELLO & FOLEY
831 State Street
Santa Barbara, California 93101
(805) 564-2444

Attorneys for Petitioners

(1:\1372\P\Rep.TXT)

**PROOF OF SERVICE BY MAIL**

*State of California*

*ss.*

*County of Los Angeles*

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 11333 Iowa Avenue, Los Angeles, California 90025; that on January 3, 1989, I served the within *Petitioner's Reply Brief* in said action or proceeding by depositing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at Los Angeles, California, addressed as follows:

Clerk, United States
Supreme Court
One First Street, N.W.
Washington, D.C. 20543
*(Original and forty copies)*

William Lukens
Lukens, Perry, Drummond
& Cooper
One Maritime Plaza
San Francisco, California 94111

Frederick N. Watson
Attorney at Law
1111 Civic Drive, Suite 300
Walnut Creek, California 94596

Bert Cooper
O'Melveny & Myers
400 South Hope Street
Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 3, 1989, at Los Angeles, California.

Betty J. Malloy
*(Original signed)*